

Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime

Kanchana Wangkeo[†]

“It is understandable that the view is sometimes expressed that ‘things’ are not as important as human beings . . . and that consideration of the fate of objects should always be secondary to that of the alleviation of human suffering. Yet we at UNESCO are constantly confronted by the pleas of people who are physically suffering to help them save their cultural heritage, for their suffering is greatly increased by the destruction of what is dear to them. Their cultural heritage represents their history, their community, and their own identity. Preservation is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life.”¹

I.	INTRODUCTION	185
A.	<i>Context</i>	185
B.	<i>Overview</i>	188
1.	<i>Definitions</i>	188
2.	<i>Significance</i>	189
a.	<i>Association/Symbolism</i>	189
b.	<i>Information</i>	190
c.	<i>Aesthetics</i>	190
d.	<i>Economics</i>	190
C.	<i>Peacetime Threats to the Cultural Heritage</i>	191
1.	<i>Economic Development</i>	191
2.	<i>Iconoclasm</i>	192
D.	<i>Difficulty of Agreeing on an International Norm</i>	192
E.	<i>Lack of Authority on Subject</i>	195
1.	<i>The Rise of Lawmaking on Cultural Heritage</i>	195
2.	<i>Domestic Legislation</i>	196
3.	<i>International Conventions and Agreements</i>	197
F.	<i>Methodology</i>	200
II.	CASE 1: THE ASWAN HIGH DAM AND THE THREAT TO ABU SIMBEL AND PHILAE ISLAND (1955-1980)	202
A.	<i>Introduction</i>	202
B.	<i>Facts</i>	202
1.	<i>Context</i>	202
2.	<i>Threat</i>	205
3.	<i>Reaction</i>	206
4.	<i>Outcome</i>	207
C.	<i>Analysis of Claims</i>	209

[†] J.D., Yale Law School, 2002; A.B., Duke University, 1998; Fulbright Scholar 1998-99. My deepest gratitude to Professor Michael Reisman for his helpful comments and encouragement on previous drafts of this Article. Thank you also to my family for their unerring support, and to the YJIL staff and my Articles Editors, Anya McMurray and Michael Becker for their dedication to this piece. All opinions, omissions, and errors of fact are of course my own.

1. Lyndel V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in *THE SPOILS OF WAR* 225 (Elizabeth Simpson ed., 1997).

1.	<i>Egypt's Claim</i>	209
2.	<i>Counterclaims</i>	210
D.	<i>The Role of Cultural Heritage in Decision-Making</i>	210
1.	<i>Sudan</i>	211
2.	<i>Soviet Union</i>	212
3.	<i>United States and Great Britain</i>	213
E.	<i>Appraisal</i>	214
III.	CASE 2: CEAUSESCU'S SYSTEMIZATION PROGRAM AND THE THREAT TO ROMANIA'S ARCHITECTURAL HERITAGE (1971-1989).....	215
A.	<i>Introduction</i>	215
B.	<i>Facts</i>	216
1.	<i>Context</i>	216
2.	<i>Threat</i>	217
3.	<i>Reaction</i>	218
4.	<i>Outcome</i>	220
C.	<i>Analysis of Claims</i>	221
1.	<i>Ceausescu's Claims</i>	221
2.	<i>Counterclaims</i>	223
D.	<i>The Role of Cultural Heritage in Decision-Making</i>	224
1.	<i>Hungary</i>	224
2.	<i>West Germany</i>	225
3.	<i>Great Britain</i>	225
4.	<i>Non-Governmental Organizations</i>	226
E.	<i>Appraisal</i>	227
IV.	CASE 3: THE ILISU DAM AND THE THREAT TO HASANKEYF (1982-2002).....	228
A.	<i>Introduction</i>	228
B.	<i>Facts</i>	228
1.	<i>Context</i>	228
2.	<i>Threat</i>	230
3.	<i>Reaction</i>	232
4.	<i>Outcome</i>	234
C.	<i>Analysis of Claims</i>	235
1.	<i>Turkey's Claims</i>	235
2.	<i>Counterclaims</i>	237
D.	<i>The Role of Cultural Heritage in Decision-Making</i>	238
1.	<i>Syria and Iraq</i>	239
2.	<i>Non-Governmental Organizations</i>	239
3.	<i>International Businesses</i>	241
4.	<i>Export Credit Agencies</i>	241
5.	<i>States</i>	242
E.	<i>Appraisal</i>	242
V.	CASE 4: THE TALIBAN AND ITS THREAT TO THE BAMIYAN BUDDHAS (2001).	243
A.	<i>Introduction</i>	243
B.	<i>Facts</i>	244
1.	<i>Context</i>	244
2.	<i>Threat</i>	245
3.	<i>Reaction</i>	246
4.	<i>Outcome</i>	250
C.	<i>Analysis of Claims</i>	251
1.	<i>The Taliban's Claims</i>	251
2.	<i>Counterclaims</i>	254
D.	<i>The Role of Cultural Heritage in Decision-Making</i>	257
1.	<i>Cultural Heritage</i>	257
2.	<i>Religious Tolerance</i>	258
3.	<i>Cultural Tolerance</i>	259
4.	<i>Defense of Islam</i>	259
5.	<i>Self-Interest</i>	260
a.	<i>Pakistan</i>	260
b.	<i>Saudi Arabia</i>	261
E.	<i>Appraisal</i>	262
VI.	CURRENT STATE OF THE NORM.....	264
A.	<i>In General</i>	264
B.	<i>Economic Development</i>	264

C.	<i>Iconoclasm</i>	265
D.	<i>Evaluation</i>	265
VII.	PROPOSAL FOR AN ALTERNATIVE NORM	266
A.	<i>General Principles</i>	266
B.	<i>Economic Development</i>	268
1.	<i>Broad Interpretation of Improved Quality of Life</i>	268
2.	<i>Participation of Affected Communities</i>	269
3.	<i>Equitable Distribution of Benefits</i>	269
4.	<i>Least Destructive Alternative</i>	270
5.	<i>Duty to Mitigate Harm</i>	270
6.	<i>Financial and Technical Support</i>	270
C.	<i>Iconoclasm</i>	271
1.	<i>Iconoclasm as a Human Rights Issue</i>	271
2.	<i>Symbols To Be Protected</i>	271
a.	<i>People Without Access to Power</i>	271
b.	<i>Meaning of Symbols</i>	272
c.	<i>Meaning of Act</i>	273
VIII.	CONCLUSION	273

I. INTRODUCTION

A. Context

Although Saudi-Turkish relations have historically been tense, the events of January 2002 raised the intensity level to a fevered pitch. Despite Turkey's formal protests, Saudi Arabia demolished a 200-year-old Ottoman castle² in order to build a five-star hotel, residential complex, and parking lot.³ Saudi Arabia defended the action by citing the need to expand facilities for Muslims making their pilgrimage to Mecca.⁴ The country's infrastructure was under extreme stress because nearly three million Muslims journeyed to Mecca every year for the pilgrimage required of all Muslims, and that number was expected to increase.⁵ Therefore, the demand for accommodations would only grow, and Saudi Arabia would have to absorb it. Given these circumstances, the choice for Saudi Arabia was clear. It would have to sacrifice the castle in order to develop the site for all Muslims.⁶ Saudi Arabia stressed that the castle was not a sacred site and that the decision was an internal matter.⁷

2. The Ottoman Turks built al-Ajyad in 1780 to protect the city and its Muslim shrines from outside attacks. *Turkish FM Accuses Saudis for Demolition of Ottoman Castle*, XINHUA NEWS AGENCY, Jan. 10, 2002, LEXIS, Nexis Library, News Group File.

3. *Saudi Arabia Defends Razing of Turkish Fort*, RECORD (Bergen County, N.J.), Jan. 15, 2002, LEXIS, Nexis Library, News Group File; James Dorsey, *Turks Angry at Fate of Mecca Fort*, SCOTSMAN, Jan. 10, 2002, LEXIS, Nexis Library, News Group File; *Saudi papers criticize Turkey's protest over demolition of old castle in Mecca*, BBC WORLDWIDE MONITORING, Jan. 12, 2002, LEXIS, Nexis Library, News Group File.

4. *Saudi minister tells Azeri paper of reasons for pulling down Turkish castle*, BBC WORLDWIDE MONITORING, Jan. 20, 2002, LEXIS, Nexis Library, News Group File.

5. *Turkey: Saudi envoy says historic fortress to be rebuilt in another site*, BBC WORLDWIDE MONITORING, Jan. 14, 2002, LEXIS, Nexis Library, News Group File.

6. Frazer Thomson, *Saudis Reject Castle Criticism*, BUS. A.M., Jan. 10, 2002, LEXIS, Nexis Library, News Group File; *Saudi minister tells Azeri paper of reasons for pulling down Turkish castle*, *supra* note 4.

7. *Saudi papers criticize Turkey's protest over demolition of old castle in Mecca*, *supra* note 3; *Turkey: Saudi envoy says historic fortress to be rebuilt in another site*, *supra* note 5.

Nonetheless, Turkey protested because it viewed the destruction as an act of "cultural genocide."⁸ The Ottomans were the ancestors of the Turks, and many Turks felt personally offended by Saudi Arabia's decision. Turkey therefore demanded that the Saudis cease the development plans and asked the United Nations Educational, Scientific and Cultural Organization (UNESCO) to intervene.⁹ UNESCO responded by initiating an investigation and facilitating diplomatic efforts between the two countries. Although Saudi Arabia tried to defuse the tension by announcing its plans to rebuild the castle elsewhere,¹⁰ it ended up bulldozing the castle instead, which set off a new round of protests from Turkey.¹¹ To retaliate, Turkey is now considering a boycott of the Umra, or visits to the holy sites during the off-season.¹² Since the castle has already been destroyed, Turkey is unlikely to be satisfied with anything Saudi Arabia does now.

This Saudi-Turkish incident highlights the need for a clearly articulated norm to govern the destruction of cultural heritage during peacetime. The need exists because cultural heritage may be an area of international law in which the importance of state sovereignty is eroding to accommodate the values of the larger international community. Turkey's reaction to Saudi Arabia's development plan demonstrates a public interest in relics that extends beyond national boundaries. Cultural heritage is conceived of as part of the "common heritage of mankind"¹³ so that these objects are a common resource, like air or water, and states hosting these resources become custodians of the property for the benefit of all. The problem with this conception, however, is that cultural heritage is not common property in the traditional sense. The resource is not necessarily open to public access and use, and the costs of use are borne by only one party. The host state necessarily bears the responsibility for protecting cultural treasures because of their location, and this puts preservation in direct conflict with fundamental principles of international law—state sovereignty and the right of nonintervention.¹⁴ The Ottoman castle

8. *Turkish FM Accuses Saudis for Demolition of Ottoman Castle*, *supra* note 2.

9. Elif Unal, *Saudi Arabia Changes Track in the Castle Row: Experts Not Convinced by Saudi Re-construction and Preservation Plans Since the Historical Fort Destroyed* [sic] by Bulldozers[sic], *TURKISH DAILY NEWS*, Jan. 11, 2002, http://www.turkishdailynews.com/old_editions/01_11_02/for.htm#f3.

10. *Turkey: Saudi envoy says historic fortress to be rebuilt in another site*, *supra* note 5.

11. Unal, *supra* note 9; *Press Scanner: The Moment of Demolition*, *TURKISH DAILY NEWS*, Jan. 17, 2002, http://www.turkishdailynews.com/old_editions/01_17_02/for.htm#f3.

12. *Turkish Press Scanner: "Don't Let Us Do Umra"*, *TURKISH DAILY NEWS*, Jan. 12, 2002, http://www.turkishdailynews.com/old_editions/01_12_02/for.htm#f3.

13. The concept of the "common heritage of mankind" was first introduced in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention] and was extended in subsequent international agreements. This concept has also been applied in the areas of environmental conservation, outer space, and the resources of the deep seabed. SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 57-62 (1978).

14. The U.N. General Assembly proclaims "the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the [U.N.] Charter. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law." Moreover, "each State has the right freely to choose and develop its political, social, economic and cultural systems." Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the

was situated in Saudi Arabia, so traditional international law suggests that the Saudis should have been able to do whatever they wanted with the structure. However, this argument will rarely satisfy involved parties, such as Turkey. As we shall see, Saudi Arabia's treatment of the castle was not unique nor was Turkey's response. Cultural heritage is often threatened for reasons the host states think are legitimate. These host states usually have their own laws governing preservation, so why is an international norm even necessary? The short answer is that international actors have strong feelings about cultural heritage, and unless that changes, threats to it can and will continue to provoke international protest and conflict. International actors need to know under what circumstances they may lawfully destroy relics.

This Article seeks to determine the current norm regarding the peacetime destruction of cultural heritage by analyzing four case studies focusing on economic development and iconoclasm: (1) the Aswan High Dam and its threat to Abu Simbel and Philae Island; (2) Ceausescu's "systemization" program and its threat to Romanian vernacular heritage; (3) the Ilisu Dam and its threat to Hasankeyf; and (4) the Taliban and its threat to the Bamiyan Buddhas. The Article pays special attention to development and iconoclasm because there is a lack of authority on the subject, because these threats are particularly in the control of states, and because they pose a continuing threat to the cultural heritage today.

Ultimately, these case studies show that an international norm that privileges economic development over iconoclasm as a reason for destroying cultural heritage has developed, but that the norm increasingly places greater demands on host states, such as making a good faith effort to preserve cultural relics or to mitigate the damaging effects of development projects. States that destroy relics and ignore the concerns of interested parties will be disadvantaged in their international relations—either by a lack of cooperation, or, in extreme cases, by their total exclusion from the world community. Although the norm considers the interests of both host states and external parties, it does not go far enough because states can too easily abuse the "development justification" to suit their purposes. Therefore, this Article uses the case studies as a starting point for determining, in a more nuanced fashion, which factors may or may not excuse heritage destruction. These factors are discussed in depth at the Article's conclusion.

In terms of organizational structure, Part I of this Article presents a general overview of the issues surrounding cultural heritage and the legal regime protecting it. Parts II through V comprise the individual case studies. Each Part will evaluate the claims of all parties to the conflict and assess the role that cultural heritage played in the decision-making in each situation. Part VI summarizes the current state of the norm as derived from the four examples, and Part VII advances a more positive international standard for relics protection.

B. Overview

1. Definitions

The phrase "cultural heritage" is generally understood to describe objects inherited from past generations that relate to a society's cultural development. It includes monuments, groups of buildings, and sites, "which are of *outstanding universal value* from the point of view of history, art or science."¹⁵ Although most international conventions use the term "cultural property,"¹⁶ the word "heritage" has come to be preferred because it implies that the object should be cherished and preserved.¹⁷

This Article uses an even more specific definition of "cultural heritage" than the general understanding. Here, the term only encompasses tangible items of cultural value. More recently, the definition has grown to include intangible commodities, such as dances and folklore.¹⁸ Including them here would only confound the analysis since they are so closely tied to human rights. In addition, this Article uses the terms "cultural heritage," "cultural property," and "relics" interchangeably, but this is only for stylistic variation. The terms do not have independent significance in this Article even though they may have different meanings in other contexts.

Moreover, cultural heritage should be distinguished from national patrimony. An object may be nationally, but not internationally, important and vice versa. "National patrimony" as used in this Article refers to items that are culturally valuable to the citizens of a nation, which is often reflected by the fact that the state extends legal protections to the property. However, people from other states may not be interested in its fate at all, so that it would not qualify as cultural heritage. For example, the former residence of a domestic political figure might be considered national patrimony, but it would probably not rise to the level of cultural heritage if the figure were unknown outside of her own country. Conversely, a host state might not consider a relic important at all while outsiders consider it highly significant. The Saudi-Turkish incident provides one example of how this might occur, even though it is debatable whether the Ottoman castle was universally valuable. The key point to remember is that objects of cultural heritage have a significance that transcends state boundaries.

In this Article, the word "peacetime" means the absence of an international war. The term "peacetime threat" refers to a threat not motivated by warfare. Therefore, a state could be involved in a civil war as long as destruction of the cultural heritage was not motivated by the armed conflict.

15. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, T.I.A.S. No. 8226, 27 U.N.T.S. 37 [hereinafter World Heritage Convention] (emphasis added).

16. E.g., 1954 Hague Convention, *supra* note 13; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; European Convention on Offences Relating to Cultural Property, June 23, 1985, 119 E.T.S., available at <http://conventions.coe.int/Treaty/en/Treaties/Word/119.doc>.

17. LYNDALL V. PROTT & P. J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: DISCOVERY & EXCAVATION 7 (1984).

18. *Id.*

This Article adopts a broad definition because even states that face internal agitation can be concerned about issues such as economic development or iconoclasm.

The terms “international actor” and “global participant” are similarly broad in that they are not limited to nation-states. They include any group or person that has the ability to influence state behavior because states are not the only actors that shape the international system. Groups such as non-governmental organizations are also effective, which is why they are included in the following discussion. In addition, when this Article uses the term “international actor,” it is referring to the state or non-state actors whose reactions are discussed in depth in each Part.

2. *Significance*

It is important to understand why cultural heritage is valuable because a premise of this paper is that it is worth preserving. The reasons for its importance can be grouped into four categories: (1) association/symbolism; (2) information; (3) aesthetics; and (4) economics.¹⁹

a. *Association/Symbolism*

Associative value refers to the tangible link that cultural heritage provides to the past.²⁰ People feel connected to certain relics because they are driven by a need for historical continuity and social identity, which is why these perceived associations form the basis of group identity.²¹ Because the objects speak to the group’s common experience, it is not surprising that states often try to encourage national integration through the use of symbols.²² For example, Central Asian states have been restoring non-Soviet monuments to strengthen their identities after gaining independence from the former Soviet Union.²³ African nations have turned to relics as a source of historical pride in the wake of decolonization.²⁴ Conversely, citizens themselves may encourage states to adopt new symbols of national identity. Windmills only came to represent the Netherlands after a Dutch citizens group lobbied for legislation protecting the windmills as symbols of their agrarian past.²⁵ In short, the associative value of cultural property leads to its symbolic power and the emotional connection that people feel towards it. This value cannot be underestimated because it probably drives international conflicts over cultural property.

19. William D. Lipe, *Value and Meaning in Cultural Resources*, in *APPROACHES TO THE ARCHAEOLOGICAL HERITAGE 1* (Henry Cleere ed., 1984).

20. *Id.* at 4.

21. *Id.* at 5.

22. *Id.* at 5 (explaining that “Western states use commemorative monuments, such as statues or battlefields, to evoke the common experiences of a heterogeneous society”).

23. Stephanie A. Dudoignon, *Culturally Correct*, *UNESCO COURIER*, Oct. 1, 1998, at 40.

24. Folarin Shyllon, *International Standards for Cultural Heritage: An African Perspective*, 5 *ART ANTIQUITY & LAW* 159, 161 (2000).

25. Arjo Klamer, *The Value of Cultural Heritage*, in *ECONOMIC PERSPECTIVES ON CULTURAL HERITAGE* 74, 80-83 (Michael Hutter & Ilde Rizzo eds., 1997).

b. *Information*

A second reason relics are significant is that they give us information about past civilizations and knowledge for future uses. With regard to the past, relics serve as a primary resource material for many disciplines, such as archaeology, history, art history, geography, and ethnology.²⁶ This is especially important for understanding oral societies because there is no record other than the material evidence of their daily existence. Furthermore, the objective nature of cultural property lends itself to reinterpretation over time, which is important since research is always influenced by the biases of the moment. In addition, we can study scientific developments, such as past climate change, the evolution of plant and animal species, the movement of the magnetic poles, and river erosion because of the biological and genetic materials found at archaeological sites.²⁷ Researchers can use this information to plan future courses of action in the same way that an architecture student might learn from the discovery of the true arch. In this sense, cultural heritage functions as a pool of common knowledge on which to base future accomplishments.

c. *Aesthetics*

Aesthetic value speaks to the artistic qualities of cultural property which provide enjoyment to the viewer. Even though aesthetic values rarely arise in conversations about preservation, people may be drawn to cultural heritage simply because they find it beautiful. Cultural property does not necessarily comprise works of art, but the two categories often do overlap.²⁸ This type of use value arises independently of the other values already expressed, and can be used to stimulate more interest in, and support for, relics preservation.²⁹

d. *Economics*

Finally, cultural heritage can be economically valuable because of adaptive reuse, cultural tourism, and the antiquities trade. Adaptive reuse means that the cultural property is modified and used for modern purposes. It may be advantageous for a state to reuse a historic building because it is

26. See Lipe, *supra* note 19, at 6.

27. CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES 243 (Michael B. Schiffer & George J. Gumerman eds., 1977) ("Paleo-Indian and Archaic deposits [in the lower Mississippi Valley] have helped geologists to establish minimal ages for the formation of alluvial surfaces."); Keith A. Dixon, *Applications of Archaeological Resources: Broadening the Basis of Significance*, in CONSERVATION ARCHAEOLOGY, *id.*, at 283 ("By their strategic locations and the evidence of past environmental characteristics preserved in [the sites], it is possible for archaeological sites to be the only sources of data available to resolve completely different kinds of problems, often with highly practical applications."); William D. Lipe, *A Conservation Model for American Archaeology*, in CONSERVATION ARCHAEOLOGY, *supra*, at 23 (explaining that archaeological sites are a repository for biological and genetic materials, which can be used to study such things as climate change).

28. Irini A. Stamatoudi, *The National Treasures Exception in Article 36 of the EC Treaty: How Many of Them Fit the Bill?*, 3 ART ANTIQUITY & LAW 39, 47 (1998).

29. See Lipe, *supra* note 19, at 7.

cheaper than demolishing it and building a new structure.³⁰ Or it may be that the new use will bring in even more revenue. For example, old palaces are being converted into luxury hotels in Hungary, Slovakia, Poland, and the Czech Republic.³¹ In addition, cultural property can increase revenue from tourism since more people are becoming interested in visiting cultural sites.³² The potential for revenue is so great that states will allocate resources according to a site's tourism value and will even protect sites that are politically problematic.³³ For example, China protects the Potala, the former residence of the Dalai Lama, as a World Heritage Site even though China officially views the Dalai Lama as a separatist enemy of the state.³⁴ Lastly, cultural property is the subject of the antiquities trade, which notoriously commands hefty sums. These economic values are likely to encourage preservation because they give states an incentive to protect relics in the face of competing revenue-generating alternatives.

C. *Peacetime Threats to the Cultural Heritage*

1. *Economic Development*

As mentioned before, one of the reasons this Article focuses on economic development is because it seriously endangers cultural heritage today. It almost goes without saying that development devastates the physical remains of cultures because large construction projects often compromise relics situated on or beneath the development site. In Germany, less than eight percent of the monuments recorded since 1830 still exist because the Germans were building on top of 102 hectares of land per day for twenty years.³⁵ However, even smaller development plans can damage a large amount of cultural property. The technical revolution in agriculture is one example because it drives the destruction of farmsteads and rural architecture, a form of cultural property known as vernacular heritage.³⁶ Since economic development will probably continue to increase over time, the danger to cultural heritage will rise in the future as well.

30. *Id.* at 8.

31. Cynthia Guttman, *Central Europe: Castles Gear up for Business*, UNESCO COURIER, July/Aug. 1999, at 49.

32. Salah Wahab, *Balancing Cultural Heritage Conservation and Sustainable Development Through Tourism*, in TOURISM AND HERITAGE MANAGEMENT 64 (Wiendu Nuryanti ed., 1997) (noting that visitation to heritage sites and museums is an increasingly popular trend).

33. Israel's conservation priorities are determined by tourism, and tourism-oriented developments put pressure on professionals. ICOMOS Israel, *Heritage at Risk: Israel*, at http://www.international.icomos.org/risk/israel_2000.htm (last visited Dec. 5, 2002). To the chagrin of scholars, the majority of sites that have been studied in depth have been studied for purposes of development into an exhibit or tourist attraction. Pat Uche Okpoko, *The Role of Cultural Resources in Tourism in Nigeria*, in CULTURAL RESOURCE MANAGEMENT 126, 129 (Bassey W. Andah ed., 1990). It is often foreigners who trigger local political interest in cultural heritage. Klammer, *supra* note 25, at 83.

34. Erik Eckholm, *China's Upbeat Governor in Tibet Promises Investment*, N.Y. TIMES, Nov. 7, 2001, at A3.

35. Joachim Reichstein, *Chapter 4: Federal Republic of Germany*, in APPROACHES TO THE ARCHAEOLOGICAL HERITAGE, *supra* note 19, at 37, 38.

36. International Committee on Monuments and Sites, *Heritage at Risk: Vernacular Heritage*, at http://www.international.icomos.org/risk/isc-verna_2000.htm (last visited Dec. 5, 2002).

2. *Iconoclasm*

The second major threat that this Article centers on is religious or political ideology that takes the form of iconoclasm.³⁷ Iconoclasm is the destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance.³⁸ In the mind of the iconoclast, annihilating the image is a way of destroying the message. Although seemingly radical, this problem is neither new nor extinct. History provides us with numerous examples of iconoclastic fervor. During the French Revolution, the revolutionaries tried to destroy all artwork and monuments connected with the king in order to delegitimize the Ancien Regime.³⁹ The move was significant to the revolutionaries because the monarchy had invested heavily in the collection and distribution of art.⁴⁰ Similarly, Christian iconoclasts from the eighth to ninth centuries destroyed images of Christ in Byzantium because they disagreed with the use of images as objects of worship and objected to the power that art bestowed on certain monks.⁴¹ When the Bolsheviks took control of Russia in 1917, they ordered the demolition of all pre-revolutionary monuments.⁴² During the Cultural Revolution, Chairman Mao tried to eliminate the Four Olds: Old Culture, Old Thinking, Old Habits, and Old Ideas.⁴³ As we will see, iconoclasm is still a formidable threat to the cultural heritage because the social issues driving iconoclasm keep recurring.

Other peacetime threats to cultural heritage include natural disaster, warfare, environmental degradation, tourism, and illicit trade. These also inflict a considerable amount of harm on cultural property, but they are beyond the scope of this Article because host states are usually not the ones perpetrating the destruction.

D. *Difficulty of Agreeing on an International Norm*

Although the international community as a whole might be in favor of an international preservation norm, the reality is that there may be good reasons for destroying the common heritage of mankind. Preservation advocates speak in terms of the "common heritage," but the responsibilities are not common at all. The country hosting the property necessarily bears the cost for its preservation and maintenance because of its location. Heritage protection entails significant opportunity costs, so the world should not insist

37. KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 115-16 (1994).

38. George Fitzherbert, *Icon Smashing—the Precedents*, BBC NEWS, Mar. 10, 2001, http://news.bbc.co.uk/2/hi/world/south_asia/1211067.stm ("The feeling was that people were attributing to the object, to the images—and this particularly applies to sculpture, which is the most realistic art form—they were attributing to the objects a power that is really only God's," said Dr. Aston [historian of the English Reformation].").

39. DARIO GAMBONI, THE DESTRUCTION OF ART: ICONOCLASM AND VANDALISM SINCE THE FRENCH REVOLUTION 31 (1997).

40. For an in-depth analysis of the French *envoi* system of art distribution, see DANIEL J. SHERMAN, WORTHY MONUMENTS: ART MUSEUMS AND THE POLITICS OF CULTURE IN NINETEENTH-CENTURY FRANCE (1989).

41. GAMBONI, *supra* note 39, at 28.

42. JOTE, *supra* note 37, at 115.

43. Fitzherbert, *supra* note 38.

on preservation if a state's reasons for destroying cultural relics are legitimate. Therefore, the issue ultimately boils down to which reasons are legitimate.

Economic development is a major problem for preservation because international law recognizes the right of states to develop freely.⁴⁴ The conundrum for heritage protection can be illustrated by comparing it to natural resource conservation. They are similar in that natural and cultural resources are often non-renewable, the effect of their depletion is felt beyond geographic boundaries, and they pose barriers to urgent development needs. Even though conservation is a pressing global concern, international law accommodates developing countries because the system operates on a principle of consensus. Developing countries may not be able to conserve because poverty forces them to consume any available resources.⁴⁵ They need to engage in pollution-causing activities because "cleaner" technologies are more expensive than "dirtier" ones.⁴⁶ By contrast, developed countries have already obtained the advantages of dirty technology.⁴⁷ It would be unfair and impractical to forbid developing countries from benefiting as well, which is why environmental treaties, such as the U.N. Framework Convention on Climate Change ("1992 Climate Change Convention"), specifically acknowledge that "Parties have a right to, and should, promote sustainable development."⁴⁸ In addition, environmental treaties provide mechanisms for financial and technical assistance so that developing countries can eventually come into compliance.⁴⁹ It is not that developing countries do not want to protect the

44. G.A. Res. 2625, *supra* note 14, at 124.

45. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 27 (1989).

46. Ileana M. Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 20, 29 (Philippe Sands ed., 1994).

47. Rio Declaration on Environment and Development, June 4, 1992, 31 I.L.M. 874, 877, available at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> [hereinafter Rio Declaration] ("In view of the different contribution to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.").

48. United Nations Framework Convention on Climate Change, May 9, 1992, art. 3, para. 4, S. Treaty Doc. No. 102-38, 31 I.L.M. 849 (1992), available at <http://unfccc.int/> [hereinafter 1992 Climate Change Convention]. See also Rio Declaration, *supra* note 47, at 876, Principle 2 ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.").

49. E.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, para. 1, S. Treaty Doc. No. 10, 100th Cong., 1st Sess., 26 I.L.M. 1550 (entered into force Jan. 1, 1989), available at <http://www.unep.org/ozone/montreal.shtml> [hereinafter 1987 Montreal Protocol] ("The Parties shall establish a mechanism for the purposes of providing financial and technical cooperation, including the transfer of technologies . . ."); 1992 Climate Change Convention, *supra* note 48, art. 4, para. 3 ("The developed country Parties . . . shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations . . ."); *id.*, art. 4, para. 5 ("The developed country Parties . . . shall take all practicable steps to promote, facilitate and finance . . . the transfer of, or access to, environmentally sound technologies . . ."); Convention on Biological Diversity, June 5, 1992, art. 16, para. 1, 31 I.L.M. 818 (entered into force Dec. 29, 1993), available at <http://www.biodiv.org> ("Each Contracting Party . . . undertakes . . . to provide and/or facilitate access for and transfer to other contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity . . ."); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, art. 3, para. 14, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 [hereinafter Kyoto Protocol] ("Among the issues to be

environment, but rather, they must prioritize social and economic development and the eradication of poverty.⁵⁰ The same can be said of cultural property protection. It is not always that states want to destroy cultural treasures, but they must take into account the needs of present and future generations. Proper protection is very expensive, and the money devoted to preservation might be better spent on building up industry or enhancing agricultural technologies.

On the other hand, the right to develop also cannot be absolute. In the environmental context, states have agreed that developing nations have responsibilities. Even though developing nations have more lax deadlines for compliance, they are still required to abide by the substantive obligations of the treaties.⁵¹ Developing nations are expected to do their part "on the basis of equity and in accordance with their common but differentiated responsibility and respective capabilities."⁵² Likewise, international actors are apt to have expectations about when states may destroy relics in order to accommodate their economic needs. This Article seeks to assess the current expectation and to prescribe what the norm should be.

This Article also addresses iconoclasm because it continues to be a significant peacetime threat to the cultural heritage. This is so because iconoclasm is driven by various ideologies, and different ways of thinking are unlikely to disappear. The problem in evaluating when demolition is acceptable is that the world does not condemn all ideologically-driven destruction. For example, we have not heard much protest over the destruction of the statue of Ferliks Dzerzhinsky, the founder of the Soviet secret police, even though it is arguably a historical monument. However, there has been protest over a proposal to re-erect it in Moscow.⁵³ Communist leaders conscientiously used art as a medium of indoctrination because they understood the power and directness of art as a social force.⁵⁴ Therefore, the people's natural response after the fall of Communism was to destroy the memory of their oppressors.⁵⁵ The justice in this seems obvious. However, the

considered shall be the establishment of funding, insurance and transfer of technology.").

50. Convention on Biological Diversity, *supra* note 49, art. 20, para. 4 ("The extent to which developing country parties will effectively implement their commitments under this Convention . . . will take fully into account the fact that economic and social developments and eradication of poverty are the first and overriding priorities of the developing country Parties."); 1992 Climate Change Convention, *supra* note 48, art. 7, para. 7 ("The extent to which developing country Parties will effectively implement their commitments under the Convention . . . will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.").

51. *E.g.*, 1992 Climate Change Convention, *supra* note 48, art. 4, para. 1 ("All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall . . ."); 1987 Montreal Protocol, *supra* note 49, art. 5, para. 1 ("Any Party that is a developing country . . . shall, in order to meet its basic domestic need, be entitled to delay for 10 years its compliance with the control measures set out . . ."); Convention on Biological Diversity, *supra* note 49, art. 6 ("Each Contracting Party shall, in accordance with its particular conditions and capabilities: (a) develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity . . . and (b) integrate, as far as possible and appropriate, the conservation and sustainable use of biological diversity into relevant . . . policies.").

52. 1992 Climate Change Convention, *supra* note 48, art. 3, para. 1.

53. *Russia: A Vote for the Czar*, N.Y. TIMES, Oct. 11, 2002, at A6.

54. HELLMUT LEHMANN-HAUPT, ART UNDER A DICTATORSHIP xviii, 237 (1954).

55. GAMBONI, *supra* note 39, at 67.

purpose behind the creation of a relic cannot be determinative of whether it should be saved, for if this were the case, many sites we now consider cultural heritage would never pass the test. The Egyptian pyramids are universally accepted as cultural heritage, but the recognition does not change the fact that they were monuments “built by tyranny for tyranny.”⁵⁶ If the slaves of Egypt had revolted and formed a new nation, would the world have found it acceptable for them to demolish the pyramids? If it would have been acceptable then, why is it not acceptable now? These are some of the issues that international actors must grapple with when assessing the lawfulness of another state’s destructive actions.

E. *Lack of Authority on Subject*

Even though development and iconoclasm are serious threats to cultural heritage in contemporary society, there is a surprising lack of legal authority to guide decision-makers.

1. *The Rise of Lawmaking on Cultural Heritage*

Before World War II, states largely accepted that their relics would be taken or destroyed because that was the way it had always been. Conquerors were entitled to war booty, and they took it under various pretexts, such as indemnity, ransom, punishment, and crusade.⁵⁷ What was different about World War II, however, was the scale of art removal, the ideological arguments given for it, and the fact that a specialized military unit carried out the plundering. In one action, the *Einsatzstab Rosenberg* (Rosenberg’s Special Staff) invaded 69,619 Jewish homes in order to destroy any “impure” works.⁵⁸ A part of the Nazi plan to annihilate the Jews was to destroy their cultural heritage.⁵⁹ Because the Nazi program had been based on a racist ideology, a new attitude towards heritage destruction emerged after the war. No longer was it unquestionably acceptable to destroy cultural property. If it were, four Nazi officers would not have been convicted for their plundering activities by the Nuremberg Tribunal.⁶⁰ The post-war momentum led to the first international convention addressing the wartime destruction of relics, as well as a spate of domestic legislation protecting cultural property.

56. Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1155 (1990) (Abbe Gregoire once wrote, “Because the pyramids of Egypt had been built by tyranny for tyranny, ought these monuments of antiquity be demolished . . . ?”).

57. For a good overview of the history of plundering, see Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR* (Elizabeth Simpson ed., 1997).

58. WILLIAMS, *supra* note 13, at 29.

59. *Report on Looted Jewish Cultural Property*, Council of Europe, Draft Resolution, reprinted in 4 ART, ANTIQUITY & LAW 271 (1999).

60. WILLIAMS, *supra* note 13, at 29.

2. Domestic Legislation

Almost all states have legislation regulating and protecting cultural heritage at the national level.⁶¹ Some states even enhance their national protection with laws in their internal jurisdictions and in their dependent territories.⁶² During the 1980s, Lyndel Prott and Patrick O'Keefe compared and analyzed the cultural property legislation of almost 400 jurisdictions.⁶³

61. The following states have legislation protecting or regulating cultural property: Afghanistan, Albania, Algeria, Angola, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bermuda, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burma (Myanmar), Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Greenland, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kampuchea (Cambodia), Kenya, Kiribati, Korea, North Korea, South Korea, Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Mongolia, Morocco, Mozambique, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Puerto Rico, Qatar, Romania, Russia, Rwanda, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Taiwan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Turkey, Tuvalu, Uganda, United Arab Emirates, United Kingdom, United States of America, Upper Volta, Uruguay, Vanuatu, Vatican City, Venezuela, Vietnam, Western Samoa, Yemen Arab Republic, Yemen, People's Democratic Republic of, Zambia, Zimbabwe. PROTT & O'KEEFE, *supra* note 17, app. 1 at 387-418.

62. This list includes the following: Aargu (Switzerland); Alabama (U.S.); Alaska (U.S.); Alberta (Canada); American Samoa (U.S.); Andorra; Appenzell a.RH. (Switzerland); Appenzell i.RH. (Switzerland); Arizona (U.S.); Arkansas (U.S.); Baden-Württemberg (Germany); British Virgin Islands (U.K.); California (U.S.); Cayman Islands (U.K.); Colorado (U.S.); Connecticut (U.S.); Indiana (U.S.); Cook Islands (New Zealand); Delaware (U.S.); Falkland Islands (U.K.); Florida (U.S.); French Guiana; French Polynesia; Fribourg (Switzerland); Geneva (Switzerland); Georgia (U.S.); Gibraltar (U.K.); Glarus (Switzerland); Graubünden (Switzerland); Guadeloupe (France); Guam (U.S.); Hamburg (Germany); Hawaii (U.S.); Hessen (Germany); Hong Kong; Idaho (U.S.); Illinois (U.S.); Iowa (U.S.); Jura (Switzerland); Kansas (U.S.); Kentucky (U.S.); Kosrae (Micronesia); Louisiana (U.S.); Luzern (Switzerland); Macau (Portugal); Maine (U.S.); Manitoba (Canada); Marshall Islands (U.S.); Martinique (France); Maryland (U.S.); Massachusetts (U.S.); Michigan (U.S.); Minnesota (U.S.); Mississippi (U.S.); Missouri (U.S.); Montana (U.S.); Montenegro (Republika Srpska - Yugoslavia); Montserrat (U.K.); Nebraska (U.S.); Netherlands Antilles; Neuchâtel (Switzerland); Nevada (U.S.); New Brunswick (Canada); New Caledonia (France); Newfoundland (Canada); New Hampshire (U.S.); New Jersey (U.S.); New Mexico (U.S.); New South Wales (Australia); New York (U.S.); Nidwalden (Switzerland); Niedersachsen (Germany); Niue (New Zealand); Nordrhein-Westfalen (Germany); Norfolk Island (Australia); North Carolina (U.S.); North Dakota (U.S.); Northern Mariana Islands (U.S.); Northern Territory (Australia); Northwest Territories (Canada); Nova Scotia (Canada); Obwalden (Switzerland); Ohio (U.S.); Oklahoma (U.S.); Ontario (Canada); Oregon (U.S.); Palau (U.S.); Pennsylvania (U.S.); Pitcairn Island (U.K.); Ponape (Micronesia); Prince Edward Island (Canada); Puerto Rico (U.S.); Queensland (Australia); Réunion (France); Rheinland-Pfalz (Germany); Rhode Island (U.S.); Saarland (Germany); Sabah (Malaysia); Saskatchewan (Canada); Schaffhausen (Switzerland); Schleswig-Holstein (Germany); Schwyz (Switzerland); Solothurn (Switzerland); South Australia (Australia); South Carolina (U.S.); South Dakota (U.S.); St. Gallen (Switzerland); St. Helena (U.K.); St. Pierre and Miquelon (France); Tasmania (Australia); Tennessee (U.S.); Texas (U.S.); Thurgau (Switzerland); Ticino (Switzerland); Tierra Del Fuego (Argentina); Tokelau (New Zealand); Truk (Micronesia); Turks and Caicos Islands (U.K.); Uri (Switzerland); Utah (U.S.); Valais (Switzerland); Vaud (Switzerland); Vermont (U.S.); Victoria (Australia); Virgin Islands (U.S.); Virginia (U.S.); Vojvodina (Serbia); Wallis and Futuna (France); Washington (U.S.); West Virginia (U.S.); Western Australia; Wisconsin (U.S.); Wyoming (U.S.); Yap (Micronesia); Yukon (Canada); Zug (Switzerland); Zürich-land (Switzerland); Zürich-Stadt (Switzerland). *Id.*

63. *Id.* at 1.

Although they did not find many areas of universal agreement, they did find that the most basic provision adopted by all states was a prohibition against destroying, damaging, or altering cultural relics and sites.⁶⁴ The other provisions tended to cluster around certain issues, such as requiring private persons to report archaeological finds, vesting ownership of all finds in the state, prescribing the state's right to buy unique artifacts from private persons, and detailing the rules governing excavation.⁶⁵ A more recent, but must less comprehensive study, found that domestic heritage laws are now mostly concerned with combating the illicit trade in art and artifacts.⁶⁶

Notably absent from all of these laws, however, are controls on the state's authority over relics. In these domestic schemes, the government has complete authority over the treatment of heritage properties. The government dictates the modes of use and disposition, and although power is often wielded in favor of preservation, this is not always the case. Some jurisdictions actually have laws authorizing the destruction of relics under certain conditions.⁶⁷ Under Ireland's National Monuments Act of 1930, for example, the Commissioners of Public Works may grant permission to demolish a site "if and whenever they think it expedient in the interests of archaeology or for any other reason."⁶⁸ Even though most national laws lack specific provisions such as Ireland's, we will see that this is the way states operate in practice. Since there are no prohibitions against the states in their own laws, governments often make the choice to diminish the cultural heritage when circumstances require. Therefore, a gap exists in domestic legislation, and we cannot infer a state's duty to protect cultural property from the general obligations imposed on the populace.

3. *International Conventions and Agreements*

Similarly, international conventions and agreements fail to address adequately the nature of contemporary threats to cultural heritage. Four global heritage protection treaties have been concluded since World War II, but none of them anticipated the role of states in destroying their own cultural heritage. The 1954 Hague Convention assumed that belligerents or external parties were the threat. So even though the Convention talks about the duty to respect and safeguard cultural property, it qualifies it by adding the phrases "foreseeable effects of an armed conflict" and "in the event of armed conflict."⁶⁹ Hence, the 1954 Hague Convention is clearly inapplicable.

64. *Id.* at 205.

65. *Id.* at 80.

66. JOTE, *supra* note 37, at 165.

67. New Zealand's Historic Places Act of 1980 allows the Historic Places Trust to authorize destruction, damage, or alteration of a site based on its own conditions. According to South Africa's National Monuments Act of 1969, the antiquities agency may permit someone to destroy, damage, excavate, alter, or remove any monument or object in its discretion. Ireland has a similar provision in its National Monuments Act of 1930. PROTTE & O'KEEFE, *supra* note 17, at 226.

68. *Id.*

69. 1954 Hague Convention, *supra* note 13, art. 3 ("The High Contracting Parties undertake to prepare . . . for the safeguarding of cultural property . . . against the foreseeable effects of an armed conflict."); *id.* art. 18 ("The Present Convention shall apply in the event of a declared war or any other conflict . . ."); *id.* art. 19 ("In the event of an armed conflict not of an international character . . . each

UNESCO's second convention was the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).⁷⁰ This treaty also addresses a serious threat to cultural heritage, but one that is not perpetrated by the state. Rather, plunderers are seen as the main culprits because they destroy valuable heritage while digging for objects that are highly valued in the international art market.⁷¹ As a result, all of the undertakings required of Parties deal with implementing measures to increase the difficulty of illegal transfers.⁷² The most recent UNESCO treaty, the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) comes closest to addressing modern threats.⁷³ The Convention begins by "noting that the cultural heritage . . . [is] increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions."⁷⁴ Furthermore, Article 5 requires that each State Party endeavor "to take the appropriate . . . measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage."⁷⁵ So at first glance, the language seems to indicate that states cannot destroy their own cultural properties. However, Articles 3 and 7 undercut this conclusion by making it clear that the parties determine which relics are protected under the Convention.⁷⁶ The international heritage system is designed "to support States Parties to the Convention in their efforts to conserve . . . heritage."⁷⁷ Arguably, the duty of protection imposed by the World Heritage Convention only applies to those relics the state intends to protect. The newest addition to the protection regime is the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.⁷⁸ Like the 1970 UNESCO Convention, the provisions of the UNIDROIT treaty are specific to illicit trafficking. The lack of authority in these conventions is regrettable

party to the conflict shall be bound . . .").

70. 1970 UNESCO Convention, *supra* note 16.

71. PATRICK J. O'KEEFE, *TRADE IN ANTIQUITIES* 14-15 (1997).

72. For example, Parties are required to issue an export certificate (art. 6), to inform hosts states of illegally removed cultural property (art. 7), and to impose penalties on violators (art. 8). 1970 UNESCO Convention, *supra* note 16.

73. World Heritage Convention, *supra* note 15.

74. *Id.* pmbl.

75. *Id.* art. 5.

76. Julia Simmonds, *UNESCO World Heritage Convention*, 2 *ART ANTIQUITY & LAW* 257, 265 (1997) (discussing three Australian cases holding that states accept obligations to protect cultural heritage even if the property has not been listed yet).

77. Article 3 reads, "It is for each State Party to this Convention to identify and delineate the different properties situated on its territory," while Article 7 states, "For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage." World Heritage Convention, *supra* note 15.

78. International Institute for the Unification of Private Law (UNIDROIT) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, June 24, 1995, 34 I.L.M. 1322 (1995), available at <http://www.unidroit.org/english/conventions/c-cult.htm>.

because they are some of the international agreements to which countries most heavily subscribe.⁷⁹

Regional agreements are more comprehensive, but by definition, they only apply to a limited number of states. Europe has the most extensive treaty regime for protecting cultural heritage, with four agreements to its credit: (1) the European Cultural Convention (1954),⁸⁰ (2) the European Convention on the Protection of the Archaeological Heritage (1969),⁸¹ (3) the European Convention on Offences Relating to Cultural Property (1985),⁸² and (4) the Convention for the Protection of the Archaeological Heritage (Revised) (1992).⁸³ The European agreements go further than the UNESCO conventions because they were driven by a different purpose. Rather than responding to specific threats, such as warfare or illicit trafficking, the Council of Europe acted out of a more general desire "to safeguard and encourage the development of European culture."⁸⁴ Therefore, from the earliest European Cultural Convention, Contracting Parties were ordered to "take appropriate measures to safeguard [objects of European cultural value] and . . . ensure reasonable access thereto."⁸⁵ European understanding has become even more sophisticated in the Revised Convention for the Protection of the Archaeological Heritage. The Revised Convention is the most advanced of its kind because it specifically considers economic development as a threat to Europe's archaeological heritage. In particular, the Convention calls for the integration of archaeology into state planning policies.⁸⁶ State Parties are supposed to involve archaeologists in any development scheme and are to include damage to relics in their environmental impact statements.⁸⁷ Where relics are found, states should preserve them *in situ* or modify their plans to minimize the impact on archaeological heritage.⁸⁸ Although the European models are exemplary, they only clarify what the *regional* norm is or aspires to be. Moreover, European legislation is likely to be more advanced than that from other parts of the world because heritage legislation originated on the continent.⁸⁹

Regional and bilateral agreements outside of Europe predominantly focus on illicit trade as the major problem in cultural heritage preservation. For instance, the former Communist countries negotiated the Agreement Concerning Cooperation and Mutual Assistance with Regard to Holding and Restitution of Cultural Property Illicitly Carried Across State Borders

79. The 1970 UNESCO Convention had 92 States Parties as of October 18, 2001. The World Heritage Convention had 168 parties as of April 10, 2002, <http://www.unesco.org/whc>.

80. European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139 (1955).

81. European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 66 E.T.S., available at <http://conventions.coe.int/Treaty/en/Treaties/Word/066.doc>.

82. European Convention on Offences Relating to Cultural Property, *supra* note 16.

83. European Convention on the Protection of the Archaeological Heritage, Jan. 16, 1992, 143 E.T.S., available at <http://conventions.coe.int/Treaty/en/Treaties/Word/143.doc> [hereinafter Revised Convention].

84. European Cultural Convention, *supra* note 80, pmb1.

85. *Id.* art. 5.

86. Revised Convention, *supra* note 83, art. 5(i).

87. *Id.* arts. 5(i), 5(iii).

88. *Id.* art. 5(ii)(a).

89. JOTE, *supra* note 37, at 167.

(Plovdiv Agreement).⁹⁰ The title of the convention is self-explanatory. Likewise, the Organization of American States (OAS) implemented the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (San Salvador Convention).⁹¹ Bilateral agreements, mostly between Western nations, also have the same effect.⁹²

The point of this exhaustive review is to highlight how silent existing laws are when it comes to state-sponsored destruction during peacetime. The drafters of the World Heritage Convention actually deleted the phrase "in time of peace" from the agreement.⁹³ This is unfortunate since a state's own policies often cause the most damage to cultural property.⁹⁴ The gap is logical however, when one considers that the historical threats to relics *were* external. The threat came from belligerents, vandals, looters, and professional smugglers. However, state responsibility in relics destruction is a growing problem in the modern world, and protests are growing louder.

F. *Methodology*

This Article studies four specific events as a way of providing guidance to decision-makers acting within the interstices of international cultural heritage law. Usually we would start with traditional legal sources, but as we have seen, existing treaties and statutes have not clarified when peacetime destruction is lawful. However, this does not mean that there is no law to be found. International actors often judge the lawfulness of behavior by studying the reaction of key actors to particular events.⁹⁵ This makes sense when we consider that law functions to prescribe which behaviors are acceptable in a well-ordered society. Even though a norm may not be codified in law, global participants may still have expectations about how to act. Past case studies are useful then because they reveal what the operational norms are in a given situation, and this, often times, may be a more accurate predictor of what international actors will in fact do. This is so because in all legal systems, much of what is codified as law is really intended to be aspirational rather than to regulate actual behavior.⁹⁶

Specifically, this Article assesses the international reaction to the Aswan High Dam and the Ilisu Dam cases to determine if and when economic development can excuse cultural property destruction. It also looks at the

90. Dziennik Ustaw, No. 38 (1988) (in Russ.), cited in JOTE, *supra* note 37, at 178 n.36.

91. Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350, available at <http://sedac.ciesin.org/entri/register/reg-088.rrr.html>.

92. Examples are the Cultural Convention between the United Kingdom and Spain; the Cultural Agreement between Spain and Brazil; the Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties between the United States and Mexico; and the Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties between the United States and Peru. JOTE, *supra* note 37, at 167-72.

93. Robert L. Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, 2 EARTH L.J. 45, 53 (1976).

94. Simmonds, *supra* note 76, at 273.

95. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 5 (W. Michael Reisman & Andrew Willard eds., 1988).

96. *Id.* at 11.

world's response to Ceausescu's systemization program and the Taliban decree to see how actors view iconoclasm. The cases are presented in chronological order rather than by the type of threat in order to emphasize the increasing importance of cultural heritage over recent decades, regardless of the context in which the destruction occurred. This is also one of the reasons that the circumstances of each case study are so remarkably different from one another.

Since this Article focuses on particular events, I have consciously chosen to make the case studies factually rich in order to provide a proper context and to enable the reader to draw his or her own conclusions about the operational norms at play. This is in stark contrast to the way that judicial opinions are written, in which the statement of facts is often so sparse that the reader lacks a proper context for understanding the law.⁹⁷ Although the reader may sometimes feel that the completeness of information is daunting, the real purpose is to compensate for my own biases as a North American scholar. I have tried to arm the reader with enough information not only so that she can agree with me, but also so that she can intelligently disagree with me as well.

As a final comment on methodology, there are, of course, limitations with this case study method. The most obvious is that I could only study incidents that received considerable media attention. Without such media exposure, there was simply not enough information to analyze. Thus, the cases are not representative of all peacetime threats to cultural heritage or even economic development or iconoclasm. However, they are still valuable for illuminating trends in international cultural heritage law. In addition, even though I have tried to present the reader with as neutral an analysis as possible, there may still be an Anglo-American bias because of my reliance on English-language sources. In each Part, this Article presents the reactions of different participants to an event, but language limitations made many sources inaccessible, and perhaps some of my conclusions would have been different had I been able to look at the original sources. Finally, it is impossible to discuss cultural heritage as an isolated issue because problems often arise in which multiple factors are involved, such as human rights or foreign policy. This Article attempts to tease out the cultural heritage concerns in order to make a point—that cultural heritage has become an international issue and that there is a nascent code of conduct forming with regard to peacetime destruction of relics. However, the reader should always bear in mind that we can never be sure exactly how much each factor counts towards a particular outcome. All this Article seeks to do is to present the best approximation possible.

97. *Id.* at 18.

II. CASE 1: THE ASWAN HIGH DAM AND THE THREAT TO ABU SIMBEL AND PHILAE ISLAND (1955-1980)

A. *Introduction*

We begin with the case of Egypt's⁹⁸ construction of the Aswan High Dam during the 1960's because it was the first case of relics destruction after World War II that drew considerable international attention. As mentioned previously, it was not until World War II and the Nazi campaign against "impure" art that attitudes began to change about a state's right to determine the fate of cultural heritage. Egypt's proposed dam offers insight into how much opinions may have changed in the first post-war decade as well as how current considerations of lawfulness may be influenced by legitimate peacetime concerns. In this case, the alleged peacetime concern was economic development because Egypt claimed to be building the dam to alleviate the country's need for food and electricity. Therefore, this case serves as a baseline to assess the importance of cultural heritage in international affairs and as a gauge of the legitimacy of destroying relics for development purposes. In the end, I find that although geopolitical considerations outweighed all else, international actors did consider the importance of cultural heritage. However, they also considered a state's right to develop, even at the expense of that same heritage.

B. *Facts*

1. *Context*

The Aswan High Dam became the center of Egypt's economic and political strategy during the 1950s because it promised to solve Egypt's population problem. Before the advent of dams, the country relied on basin irrigation, which meant that farmers could only plant once a year after the Nile River had flooded, leaving behind its rich silt. Dams solved this problem by enabling controlled irrigation of the land year round.⁹⁹ Thus, the Aswan High Dam would enable farmers to plant three crops throughout the year instead of just one, and would allow greater diversification of crops.¹⁰⁰ This development was highly significant because experts estimated that Egypt's population would double from 1947 to 1980,¹⁰¹ yet agricultural production had only increased by about twelve percent within the past fifty years.¹⁰² Even though Egypt had built the first Aswan Dam to deal with this problem, the project had suffered from poor planning, and the dam outlived its usefulness within five years.¹⁰³ Although the new dam would barely allow agriculture to

98. At the time of these events, Egypt was officially known as the United Arab Republic.

99. YUSUF A. SHIBL, *THE ASWAN HIGH DAM* 38-39 (1971).

100. Sharif S. Elmusa, *The Economy, in EGYPT: A COUNTRY STUDY* 188 (Helen Chapin Metz ed., 1990).

101. UNESCO, *TEMPLES AND TOMBS OF ANCIENT NUBIA: THE INTERNATIONAL RESCUE CAMPAIGN AT ABU SIMBEL, PHILAE AND OTHER SITES* 50-51 (Torgny Säve Söderbergh ed., 1987) [hereinafter *INT'L RESCUE CAMPAIGN*].

102. Richard Rutter, "*High Dam*" is Key to Water, Power, N.Y. TIMES, May 2, 1955, at 29.

103. JILL KAMIL, *ASWAN AND ABU SIMBEL: HISTORY AND GUIDE* 102 (1993).

keep up with the population increase,¹⁰⁴ President Nasser believed that it was the key to Egypt's economic development. In 1954, an international committee of experts confirmed that the dam was the proper course of action.¹⁰⁵

In addition, the dam would help Egypt remain independent from outside influences by allowing more rapid industrialization. Egyptian leaders thought this was particularly important since British occupation had only ended in 1954, and Egypt was eager to keep foreign powers at bay.¹⁰⁶ By bringing new industry to every town, Nasser hoped to increase workers' wages and standard of living and to make the entire country generally self-sufficient.¹⁰⁷ Industry, however, required an inexpensive electricity source. The dam would accomplish this by producing ten billion kilowatt hours of hydroelectric power, which could be expanded if need be.¹⁰⁸ This power was necessary for industrialization because other power sources, such as oil and nuclear energy, were not available options at the time.¹⁰⁹

Though the dam would have strengthened Egypt's economic independence, it ironically threatened the country's political autonomy. Egypt committed to spending \$900 million of its own money on the dam but was still short \$600 million for the dam itself and \$700 million for the associated irrigation and power transmission works.¹¹⁰ After breaking free of British control, Nasser was determined to maintain Egypt's status as a non-aligned state during the Cold War.¹¹¹ However, Egypt's need for cash paved the way for an East-West struggle for influence in the Middle East. Both the Soviet bloc nations and the Western powers competed to finance the first stage of the dam construction.¹¹² Nasser preferred to get financing from the World Bank and the West,¹¹³ but he used offers from the Communist Bloc as leverage to gain concessions from the West.¹¹⁴

The International Bank for Reconstruction and Development (IBRD or the World Bank) found that the project was technically sound but that some

104. Osgood Caruthers, *Egyptian Dam to Dwarf Pyramids*, N.Y. TIMES, Feb. 6, 1951, at 1.

105. INT'L RESCUE CAMPAIGN, *supra* note 101, at 54.

106. See Mary Ann Fay, *Historical Setting*, in EGYPT: A COUNTRY STUDY, *supra* note 100, at 60; Raymond A. Hinnebusch, Jr., *Government and Politics*, in EGYPT: A COUNTRY STUDY, *supra* note 100, at 227, 283.

107. MORRIS LLEWELLYN COOKE, NASSER'S HIGH ASWAN DAM: PANACEA OR POLITICS? 15 (1956).

108. Rutter, *supra* note 102.

109. INT'L RESCUE CAMPAIGN, *supra* note 101, at 52.

110. Edwin Dale, Jr., *Talks Open Today on Nile Dam; Financing Up to U.S. or Soviets*, N.Y. TIMES, Nov. 21, 1955, at 1.

111. Fay, *supra* note 106, at 60-61.

112. Egypt entertained offers from the Soviet Union, United States, Great Britain, France, Belgium, West Germany, East Germany, Japan, Czechoslovakia, Bulgaria, Romania, Poland, and Hungary. See Sydney Gruson, *Break with Cairo is Hinted by Bonn*, N.Y. TIMES, Jan. 9, 1959, at 1. (reporting West German guarantee of \$50 million for the project); Dana Adama Schmidt, *Nile Dam Issue Aired*, N.Y. TIMES, Oct. 17, 1955, at 11 (reporting British, French, Belgian, and West German offers to participate in World Bank financing); *East German in Cairo*, N.Y. TIMES, Nov. 10, 1955, at 9; *Proposed Japanese Aid for Aswan Dam*, TIMES (London), July 31, 1957, at 6; *Red Bloc Aswan Aid Planned*, N.Y. TIMES, Feb. 16, 1959, at 9; *Soviet Fiscal Offer to Egypt Confirmed*, N.Y. TIMES, Oct. 14, 1955, at 9; *U.S. Ready to Finance Part of Nile and Jordan Projects*, N.Y. TIMES, Oct. 11, 1955, at 6.

113. Schmidt, *supra* note 112.

114. Egypt said it would accept the Soviet offer if Western aid was not forthcoming. *Egypt-U.S. Parley on Financing*, N.Y. TIMES, Oct. 31, 1955, at 5.

obstacles still remained. The most important of these obstacles was Egypt's failure to conclude a water agreement with Sudan.¹¹⁵ Egypt and Sudan were both parties to the 1929 Nile Waters Agreement, under which neither party could develop on the Nile without the other's consent.¹¹⁶ It was critical that the two countries conclude an agreement on the High Dam because water disputes had the potential to be extremely destabilizing. Egypt finally reached an agreement with Sudan and was able to secure a \$200 million pledge from the IBRD, as well as a \$400 million promise from the United States and Great Britain.¹¹⁷ Implicit in the offer was Egypt's exclusion of the Soviet Union from the project.¹¹⁸

However, relations turned sour between Egypt and its Western financiers after Israel attacked Egyptian outposts in Gaza in 1955.¹¹⁹ The United States and its allies refused to sell weapons to Egypt,¹²⁰ and this forced Nasser to buy arms from Czechoslovakia,¹²¹ and later the Soviet Union.¹²² The United States and Great Britain became so incensed that they withdrew their aid for the dam,¹²³ and Egypt retaliated by nationalizing the Suez Canal.¹²⁴ The international community did not protest nationalization in the end after Egypt promised to compensate the stockholders of the Suez Canal Company and to allow all ships to pass.¹²⁵ Therefore, when Britain, France, and Israel tried to retake the canal, other states condemned the tripartite invasion as illegitimate.¹²⁶ This falling out caused Egypt to turn to the Soviet Union for dam financing, and it was offered a twenty- to thirty-year loan with an interest rate of two percent.¹²⁷ The Soviet Union granted Egypt \$100 million for the first stage of the dam, and construction began on January 9, 1960.¹²⁸

115. *World Bank Sends 2 Experts to Cairo*, N.Y. TIMES, Oct. 24, 1955, at 8.

116. Kenneth Love, *Egypt and Sudan Disrupt Nile Talk*, N.Y. TIMES, May 2, 1955, at 29.

117. *Egypt Says She Accepts Dam Loan "in Principle"*, N.Y. TIMES, Feb. 9, 1956, at 37 (accepting IBRD loan); Dana Adams Schmidt, *U.S. May Urge Congress to Help Egypt Build Dam*, N.Y. TIMES, Dec. 8, 1955, at 1 (United States and Great Britain on the verge of agreeing to extend \$600 million in aid); *West Will Help Egypt Build Dam*, N.Y. TIMES, Dec. 18, 1955, at 1 (United States and Great Britain agree to give \$70 million to Egypt to start dam project).

118. *Russia Still Offering Egypt Help on Dam*, N.Y. TIMES, Dec. 19, 1955, at 1.

119. Fay, *supra* note 106, at 61.

120. The United States, France, and Great Britain flatly refused to give Egypt aid, and the U.S. Secretary of State made it difficult for Egypt to purchase arms elsewhere. *Id.*

121. *Id.*

122. *High Dam Plans Revised*, TIMES (London), July 23, 1957, at 8 (reporting that Egypt's Nasser expressed gratitude to the Soviet Union for supplying arms for its dispute with Israel).

123. The United States withdrew its initial support of \$55 million in July 1956, Britain withdrew its offer of \$14 million, and the IBRD cancelled its loan. Jay Walz, *Aswan Dam Start Set for Saturday*, N.Y. TIMES, Jan. 3, 1960.

124. Nasser remarked, "We could not take this slap in submissiveness and wait for the spectre of famine and unemployment to hover over us, so we nationalized the Suez Canal." *High Dam Plans Revised*, *supra* note 122. U.S. officials also believed that withdrawal of aid led to Egypt's nationalization of the Suez Canal. *U.S. "Cause of Suez Crisis": Mr. Duller Blamed in Senate*, TIMES (London), Aug. 15, 1957, at 8.

125. Fay, *supra* note 106, at 63.

126. *Id.*

127. Osgood Caruthers, *Egypt Bids West Broaden Dam Aid*, N.Y. TIMES, Jan. 7, 1956, at 1.

128. *Soviet Ratifies Aswan Accord*, N.Y. TIMES, Feb. 16, 1959, at 1.

2. Threat

Experts predicted that the Aswan High Dam would back up the Nile River for over 300 kilometers into Egypt and over 200 kilometers into Sudan, covering an area known as the Lower Nubia.¹²⁹ Nubia had been the home of at least six different civilizations between 3800 B.C. and 600 A.D.¹³⁰ and was particularly rich in artifacts because it had been the focus of construction activity during the Pharaonic Period.¹³¹ Therefore, the dam threatened countless monuments and artifacts.¹³²

The most famous of the sites were the temples of Abu Simbel and Philae Island, and their prominence was probably responsible for rescuing what little was saved.¹³³ The temples of Abu Simbel were significant because of their historical background, method of construction, and artistic features, which were among the most detailed and impressive in all of Egypt.¹³⁴ In particular, the temples were unique because they were not free-standing like most edifices, but were hewn into the side of the mountain. The innermost chambers of Ramses' Temple reached as far in as sixty-one meters.¹³⁵ The Temple of Isis was Philae Island's most acclaimed temple, and it was important as Egypt's last outpost of paganism.¹³⁶ This temple was built during Ptolemaic times and served as a home to the cult of Isis, whose members believed in the goddess' ability to heal and to control the Nile.¹³⁷ Although the Temple of Isis had already been partially submerged by the first Aswan Dam, the new dam would create fluctuating water levels that would cause the temples to collapse completely.¹³⁸

In addition to these monuments, archaeological sites were also threatened. The threat was not as great in Egypt as in Sudan because the Egyptian Antiquities Service had extensively surveyed much of the area when Egypt built the first Aswan Dam.¹³⁹ Egypt therefore had an idea of the extent of documentation that still had to be completed.¹⁴⁰ However, the situation was completely different in Sudan, which had never prepared such a survey. The impending flood threatened to wipe out an irreplaceable record of a poorly-understood element of African history.¹⁴¹ The first survey showed that over one thousand archaeological sites were potentially in harm's way in Sudan.¹⁴²

129. See Gamal Mokhtar, *UNESCO and the Ancient Egyptian Heritage: from the Nubian Campaign to the Library of Alexandria*, UNESCO COURIER, Sept. 1988, at 40; Rutter, *supra* note 102.

130. David Roberts, *Out of Africa: The Superb Artwork of Ancient Nubia*, SMITHSONIAN, June 1993, at 91.

131. Mokhtar, *supra* note 129.

132. *Id.*

133. The monuments of Sinai were threatened by a canal construction project. However, appeals to UNESCO and other nations did not yield a positive response. One reason may have been that the temples at Abu Simbel were very prominent and Sinai did not have anything comparable. *Sinai Sites That Must Be Saved*, AL AHRAH WKLY., June 4, 1992, at A3.

134. KAMIL, *supra* note 103, at 126.

135. *Id.* at 120.

136. *Id.* at 63.

137. *Id.* at 61.

138. Mokhtar, *supra* note 129.

139. INT'L RESCUE CAMPAIGN, *supra* note 101, at 48-49.

140. *Id.* at 188.

141. *Id.* at 63.

142. *Id.* at 187.

Finally, the most underemphasized risk was the danger to living Nubian culture. Even though the press reported on the displacement of 33,000 Nubians,¹⁴³ the emphasis was on the immediate hardship of movement and not on the long-term loss of cultural heritage through the annihilation of traditional architecture and the disconnect caused by migration. The losses were exacerbated by the fact that the Nubians would probably not stay together to revive these traditions because families were faced with the possibility of migration to other Arab lands where they could earn better livings.¹⁴⁴

3. Reaction

Egypt discovered the threat to the cultural property in 1954 about a year after the dam site had been chosen.¹⁴⁵ The government immediately began asking for help to save the artifacts, and in 1955, Egypt created a documentation center with UNESCO's help to survey the threatened sites. Egypt extended the effort in 1958 when it asked all governments and archaeological groups to concentrate on Nubia for the next five years.¹⁴⁶ However, the response was not encouraging when only two expeditions starting working at that time.¹⁴⁷ In order to enlist more support, Egypt reversed its long-standing policy restricting the removal of Egyptian antiquities.¹⁴⁸ In return for help, Egypt would allow up to six temples to be removed from the country, allow parties to dig in once-restricted areas, and permit them to keep up to 50 percent of their finds.¹⁴⁹ If the parties did not find anything of value during their digs, they would be able to choose items from some of Egypt's collections.¹⁵⁰ The only condition was that Egypt would keep any unique finds that were necessary for completing its representative collections.¹⁵¹ Excavators were given the option of handling all of the financial, scientific, and technical aspects themselves or contributing to existing undertakings.¹⁵² Scholars found the invitation especially thrilling because Egypt had restricted their activities so heavily in the past.

Egypt officially petitioned for UNESCO's help in 1959,¹⁵³ and in response, UNESCO launched the International Campaign to Save the Monuments of Nubia. The temples of Abu Simbel became the flagship of the campaign since they fascinated the public imagination and helped generate support for rescuing other sites. However, these temples could not be salvaged

143. Jay Walz, *Aswan Dam Creates Problems For the Nubians It Will Displace*, N.Y. TIMES, Jan. 14, 1960, at A13.

144. *Id.* at 59.

145. Fekri A. Hassan, *The Aswan High Dam and the International Rescue Campaign*, in DAMS AND CULTURAL HERITAGE MANAGEMENT: FINAL REPORT, Aug. 2000, at 30 (World Commission on Dams, Working Paper), at <http://www.damsreport.org/docs/kbase/working/culture.pdf>.

146. Foster Hailey, *Aswan High Dam to Blot History*, N.Y. TIMES, Nov. 2, 1958, at A5.

147. INT'L RESCUE CAMPAIGN, *supra* note 101, at 64.

148. *Egypt Offers Treasures of the Past*, TIMES (London), Oct. 2, 1959, at G12; Jay Walz, *Scholars To Help Save Nile Relics*, N.Y. TIMES, Sept. 29, 1959, at A6.

149. Walz, *supra* note 148.

150. *Id.*

151. *Egypt Offers Treasures of the Past*, *supra* note 148.

152. *Id.*

153. Mokhtar, *supra* note 129.

like other monuments because they had been built into the side of a mountain. Parties therefore submitted proposals to UNESCO and Egypt on how to save them, and the decision was ultimately made to move the temples using hydraulic jacks.¹⁵⁴ The technology had never been used like this before, giving the world another reason to remain interested in the outcome. The scheme basically entailed cutting the temples up into blocks and reassembling them elsewhere.¹⁵⁵ Even though this option was much cheaper than the other choices, it still required an estimated \$70 million.¹⁵⁶ Some scientists questioned whether salvaging these temples would be worthwhile since they had been widely studied in the past while others had never been studied at all.¹⁵⁷ There was also internal debate in UNESCO's Executive Committee on whether it would be better to spend its funds on other programs.¹⁵⁸ In the end, however, UNESCO raised the necessary money for Abu Simbel from the international community.

UNESCO launched a separate effort for the temples of Philae Island in 1968, which was similarly well received. The \$8.7 million plan was to move the temples to the nearby island of Agilkia where they would be safe from rising waters. Egypt promised to make up the difference if donors contributed at least \$6 million. Egypt's own commitment likely assured contributors of the merits of the plan since UNESCO was able to raise \$15.3 million for the operation.

Sudan asked UNESCO to help the country save its heritage, but international reaction was less enthusiastic because Sudan was not an "archaeological gold mine" like Egypt.¹⁵⁹ It could not offer rich museum pieces like Egypt could, nor did it have prominent monuments with which to anchor its campaign.¹⁶⁰ However, Sudan did permit excavators to keep 50 percent of their finds, although they had always been able to do so by law.¹⁶¹ Since Sudan's heritage consisted of many more unexplored sites than monuments, the response came mostly from academics and those interested in the informational value of the sites.¹⁶² Most of the teams that went had no experience with Sudanese Nubia nor did they have plans to do more research in other parts of Sudan.¹⁶³ The Sudanese government helped out with the effort as much as it could.

4. *Outcome*

The international appeal was quite successful. UNESCO's Member States formed national committees to generate support for exploration and

154. The French were in favor of building another dam, and the Italians were in favor of lifting the temples. *Rivalry For Honour Of Saving Abu Simbel Temples*, TIMES (London), Mar. 6, 1961, at F11.

155. See VATTENBYGGNADSBYRAN, *THE SALVAGE OF THE ABU SIMBEL TEMPLES: CONCLUDING REPORT* (1971) for a discussion on the technical aspects of the rescue operation.

156. *Cairo to Lift Shrines Threatened by Nile*, N.Y. TIMES, June 21, 1961, at A7.

157. *Saving Temples Is Disputed*, N.Y. TIMES, Mar. 16, 1961, at A10.

158. INT'L RESCUE CAMPAIGN, *supra* note 101, at 68.

159. *Id.* at 197.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

excavation.¹⁶⁴ Twenty-six countries participated directly in these excavation and preservation efforts,¹⁶⁵ and they were able to cover three-fourths of the area threatened in Egypt.¹⁶⁶ Forty-seven countries contributed a total of \$25.5 million,¹⁶⁷ while private individuals and groups donated \$7.5 million.¹⁶⁸ The Egyptian government supplemented the contributions with revenue from traveling exhibitions and a tourist tax.¹⁶⁹

Everyone's efforts paid off. Not only was Egypt able to save the temples of Abu Simbel and Philae Island, but it was also able to save over twenty other temples.¹⁷⁰ The rescue work on Abu Simbel was completed over a five year period at a cost of \$42 million.¹⁷¹ The two temples now appear as they originally did on a cliff 200 feet above the original site. Rescue teams finished moving the Philae temples to Agilkia in 1980, which is when UNESCO officially closed its campaign. Although most of the remaining sites were lost to rising waters, the flooded area was researched and excavated more thoroughly than almost any other area or country in the entire world.¹⁷² Even though investigators studied only one-third of the sites, this comprised a scientifically valid sample covering sites from all historical periods.¹⁷³ Prior to this, knowledge about ancient Nubia had been limited because of the area's isolated location and the primacy of Egyptology.¹⁷⁴ However, numerous teams went to Nubia when the dam threatened the area with total destruction. Not only did the experts increase their own knowledge, but they also engendered interest in the general public due to the rich collections they were permitted to take back home.

Egypt rewarded the parties for their help as promised. To Spain, Egypt gave the Temple of Dabud; to the Netherlands the temple of Taffa; to the United States the Temple of Dendur; to Italy the Temple of el-Lissia; and to Germany the Ptolemaic Gate of the Temple of Kalabsha.¹⁷⁵ Other institutions gained various privileges. For instance, the Egyptian government gave the Czech Institute a land concession to set up a permanent research base in

164. *Id.* at 75.

165. These countries were Argentina, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Ghana, Hungary, India, Italy, Netherlands, Norway, Poland, Spain, Sudan, Sweden, Switzerland, United Kingdom, United States, Union of Soviet Socialist Republics and Yugoslavia. *Id.* at 223-26. Note that even though the direct participants were universities, museums, or other non-governmental institutions, most of the expeditions were financed almost entirely from government grants. *Id.* at 80.

166. *Nubia Excavation Offers*, TIMES (London), June 2, 1960, at C13.

167. These contributors were Afghanistan, Algeria, Austria, Belgium, China, Cuba, Cyprus, Denmark, France, Federal Republic of Germany, Ghana, Greece, Holy See, Indonesia, Iraq, Italy, Japan, Kampuchea, Kuwait, Lebanon, Libya, Luxembourg, Malaysia, Mali, Malta, Monaco, Morocco, Nepal, Netherlands, Nigeria, Pakistan, Philippines, Qatar, Saudi Arabia, Sierra Leone, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Togo, Turkey, Uganda, United Kingdom, United States, and Yugoslavia. INT'L RESCUE CAMPAIGN, *supra* note 101, at 232.

168. *Id.* at 233.

169. *Id.* at 217.

170. *Id.*

171. ZAHY HAWASS, THE MYSTERIES OF ABU SIMBEL: RAMESSES II AND THE TEMPLES OF THE RISING SUN 27 (2000).

172. INT'L RESCUE CAMPAIGN, *supra* note 101, at 204.

173. *Id.*

174. Roberts, *supra* note 130.

175. HAWASS, *supra* note 171, at 32-35; INT'L RESCUE CAMPAIGN, *supra* note 101, at 137-44.

Egypt.¹⁷⁶ Most of the Nubian art collections around the world were a direct product of this rescue campaign,¹⁷⁷ and Nubian exhibitions have tended to have high attendance rates.¹⁷⁸ Since then, the Egyptian government has tried to capitalize on the worldwide interest in Nubia by turning Abu Simbel into a tourist attraction¹⁷⁹ and by building a new Nubian Museum to showcase the ancient culture.¹⁸⁰ Sudan also built a museum, the National Museum at Khartoum, to house its own Nubian collection.¹⁸¹

C. Analysis of Claims

1. Egypt's Claim

In terms of the rationale for the relics destruction, Egypt made a basic claim of economic necessity. Egypt argued that economic circumstances necessitated the destruction of the relics. Because of a drastic population increase in the last half century, the dam was needed to increase food production to meet the greater domestic demand and raise the standard of living.¹⁸² President Nasser therefore made land reclamation the cornerstone of Egypt's agronomic policy during the 1950s.¹⁸³ The Aswan High Dam played an important part in the overall scheme because it would have solved the most pressing land reclamation issue, irrigation. Furthermore, the dam would have resolved Egypt's need for cheap electricity, which was crucial for industrialization. It had been estimated that the new Aswan High Dam would also have saved millions of dollars in flood control and water regulation.¹⁸⁴

Although many scholars have criticized the economic wisdom of the Aswan High Dam, these criticisms generally speak to the results of the project rather than its motive.¹⁸⁵ The drawbacks of the project are numerous and fall outside the scope of this Article.¹⁸⁶ However, it is enough to say that economic necessity probably was the main, if not only, motive for Egypt's construction of the Aswan High Dam. The dam was consistent with Egypt's specific land reclamation goals and overall economic policy. It was also

176. Michelle Legge, *Digging Up the Past*, PRAGUE POST, May 6-12, 1998, at B10.

177. Krzysztof Grzyski, *Nubia: Rediscovering African Kingdoms*, AM. VISIONS, Oct. 1993, at 20, LEXIS, Nexis Library, News Group File.

178. Roberts, *supra* note 130 ("The exhibitions have had strong attendance, particularly among African-Americans, many of them in school groups. And there's evidence that awareness of Nubia is seeping into the popular culture."); Christine Temin, *Back to Egypt: New Museums, Ancient Treasures, and the MFA Connection*, BOSTON GLOBE, Mar. 28, 1999, at N1 ("The Nubian Museum attracted half a million visitors its first year.").

179. HAWASS, *supra* note 171, at 29.

180. Claudia Haj Ali, *Aswan's Nubian Museum Opens After 17 Years of Dispute*, DEUTSCHE PRESSE-AGENTUR, Jan. 7, 1998, LEXIS, Nexis Library, News Group File.

181. INT'L RESCUE CAMPAIGN, *supra* note 101, at 215.

182. HUSSEIN M. FAHIN, DAMS, PEOPLE AND DEVELOPMENT: THE ASWAN HIGH DAM CASE 12 (1981).

183. See Elmusa, *supra* note 100, at 184.

184. Osgood Caruthers, *Egypt and the World Bank in Accord on 200 Million for High Dam*, N.Y. TIMES, Feb. 10, 1956, at A1.

185. Cooke admits, "The magnitude of Egypt's dilemma is thus apparent. What is not apparent is how the High Aswan Dam would solve it." COOKE, *supra* note 107, at 12.

186. For a thorough account of the costs and benefits of dams, see World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, Nov. 16, 2000, at <http://www.dams.org>.

consistent with its historical struggle to control the Nile River.¹⁸⁷ Even though there were obvious problems, such as the environmental impact of the dam, these issues would have been endemic to all dam projects.¹⁸⁸ During the 1950s and 1960s, dams were thought to be the cure-all for society's ills,¹⁸⁹ and it is against this background that the High Dam must be judged. This is not to say, however, that economic necessity was the only motive for the development plan. The Egyptian government knew, and had received many warnings, that the population would increase to the extent that the benefits of the dam would soon be negated.¹⁹⁰ In fact, by the 1970s, Egypt's self-sufficiency in food commodities had declined.¹⁹¹ Yet the government pushed ahead knowing that the High Dam was not the panacea it was said to be. Therefore, the move had a political component as well, and Nasser admitted as much when he proclaimed the dam to be "a monument to the victory of Arab nationalism."¹⁹² The High Dam proved to be a potent symbol for Egyptians to rally around in their quest for an independent existence.

2. *Counterclaims*

International actors may have had reservations about the dam, but they did not air them publicly. For instance, they knew that the plan had a strong political component but vied to finance it anyway.¹⁹³ Parties did not challenge the legitimacy of the dam project because they apparently accepted that Egypt had a right to build it.

D. *The Role of Cultural Heritage in Decision-Making*

The first thing to note in this case is that international actors did *not* oppose the construction of the dam, either because of the impact on cultural relics or for other reasons. This indicates that the norm of state sovereignty governed international reactions to cultural heritage destruction. States could develop as they wished, regardless of the destructive impact on the common heritage of mankind. This does not necessarily mean that there was not a norm against destroying cultural heritage. A norm may have existed, but other factors, such as political concerns, might have prevented international actors from denouncing Egypt. After all, world members contributed heavily to the rescue campaign to save the monuments. Since we cannot analyze the silence of the entire world, we instead turn to the main participants in the dam scheme. Their expectations are relevant to this discussion because they could

187. KAMIL, *supra* note 103, at 99 ("To harness the Nile has been a major preoccupation of the country's leaders since ancient times.").

188. The Egyptian government took note of the negative side effects, but these were viewed as common to all dams. FAHIN, *supra* note 182, at 37.

189. INT'L RESCUE CAMPAIGN, *supra* note 101, at 54.

190. The IBRD study specifically found that "the pressure of increased population on the limited agricultural resources of Egypt would recur a decade after the completion of the Project." SHIBL, *supra* note 99, at 34. See also COOKE, *supra* note 107, at 6.

191. Elmusa, *supra* note 100, at 180-81.

192. *Ceremonial Start to Work on Aswan High Dam*, TIMES (London), Jan. 11, 1960, at F12.

193. COOKE, *supra* note 107, at 9-11.

have blocked the dam's construction if they had believed that states lacked the right to destroy relics of universal value.

1. *Sudan*

Sudan's reaction to the Aswan High Dam is significant because it had the power to stop the project if it chose. Egypt had to secure Sudan's cooperation because both states were bound by an agreement that prohibited them from developing the Nile River without the other's consent.¹⁹⁴ The IBRD would not finance the loan without a new agreement,¹⁹⁵ so if Sudan had had the inclination, it could have blocked the project altogether. In fact, Sudan tried to prevent the project in the initial stages because the High Dam deviated from its preferred plan of developing the Nile as a "hydrological unit." Hydrological unity meant that storage systems would be developed at strategic points along the entire waterway so that control was decentralized among many states.¹⁹⁶

So what role did cultural heritage play in Sudan's calculations? Although Sudan was generally less sensitive to the issue than Egypt was,¹⁹⁷ Sudan clearly showed an interest in salvaging its cultural heritage. Over 1,000 of Sudan's archaeological sites would have been inundated because of the dam, and Sudan followed Egypt's example and asked for UNESCO's help. Sudan cooperated with UNESCO and followed all of the organization's recommendations throughout the international rescue campaign.¹⁹⁸ This is significant because the campaign lasted twenty years and spanned many different administrations in Sudan.¹⁹⁹ That each government continued Sudan's commitment demonstrates a shared belief in state responsibility for protecting cultural heritage. This leads to the conclusion that Sudan must have had some other reason for not blocking the dam other than indifference to cultural heritage.

Sudan's motive for cooperating with Egypt was its own aspiration for developing the Nile River. Sudan wanted to build the Roseires Dam and needed IBRD financing. Any loan from the IBRD would have surely had the same condition as the Aswan loan: conclusion of a water-sharing agreement with the other party. If Sudan impeded Egypt's project, it could have expected a reciprocal response from Egypt when it pursued its own proposal. Therefore, Sudan had an interest in letting Egypt build the Aswan High Dam regardless of the impact on cultural property or dislocated peoples. Egypt and Sudan eventually reached an agreement, and afterwards Sudan approached the World Bank for its own \$13 million loan for the Roseires Dam.²⁰⁰ Therefore, Sudan's silence can be explained by its economic interest rather than apathy towards cultural heritage.

194. Love, *supra* note 116.

195. COOKE, *supra* note 107, at 8.

196. *Id.*

197. INT'L RESCUE CAMPAIGN, *supra* note 101, at 73.

198. *Id.* at 219.

199. *Id.* at 90.

200. *Sudan to Seek Loan for Dam*, N.Y. TIMES, Jan. 12, 1960, at A12.

2. *Soviet Union*

The Soviet Union's expectations about preservation were also relevant because the Soviets enabled the dam to be built in the first place. Once Egypt's relations had soured with the West, it became dependent on the Eastern bloc for financing. If the Soviet Union had felt strongly that Egypt could not destroy cultural property, it had an easy way to prevent the destruction.

A look at the history of Soviet archaeology shows that cultural property was a state priority even though it was never a factor in foreign policy. The Russians had developed excavation rules as early as the late 1700s and began legislating on the topic after the October Revolution of 1917.²⁰¹ In 1934, the state issued a decree on the "protection of archaeological monuments" requiring monuments to be studied where destruction was inevitable.²⁰² During the 1930s, the state carried out extensive excavation work on all main construction sites.²⁰³ Archaeological pursuits continued into the Communist era because Marxist-Leninism considered archaeology to be a historical science.²⁰⁴ It is even possible that cultural heritage was a method of Communist propaganda during the Cold War. However, even if this were the case, it still resulted in the Soviet Union's increase in excavation and preservation activities. Not surprisingly, then, the number of excavation permits increased from 116 in 1951 to 595 in 1978.²⁰⁵ All of this reveals that the Soviets probably felt that the state bore some responsibility in protecting cultural heritage, or at least documenting it if destruction were required. Therefore, the Soviet Union may well have believed that other states had the right to destroy cultural property, but that they should try to mitigate the harm whenever possible.

In this case, however, the Soviet Union did not protest because it was motivated by Cold War politics. Egypt was strategically important to the Soviet Middle East policy because Egypt exercised unique influence in the region due to its Arab-Islamic character.²⁰⁶ Egypt's Arab identity allowed it to define a common Arab policy and therefore increase its weight in world affairs.²⁰⁷ Its Islamic nature increased its credibility among other Muslim states. In addition, it was a leader among Third World countries.²⁰⁸ The Soviets therefore believed that bringing Egypt into the Soviet sphere of influence was the key to installing Communism in the Middle East. The Soviet Union's strategy in all Third World countries was to provide technical and monetary assistance to developing nations as a way of gaining a foothold in that country.²⁰⁹ For this reason, the Soviets offered favorable loan terms to

201. PROTT & O'KEEFE, *supra* note 17, at 40 (noting the first excavation of Scythian burials conducted in the Soviet Union); V.M. Masson, *Archaeological Heritage Management in the USSR*, in *ARCHAEOLOGICAL HERITAGE MANAGEMENT IN THE MODERN WORLD* 195 (H.F. Cleere ed., 1989).

202. Masson, *supra* note 201, at 201.

203. *Id.*

204. *Id.* at 198.

205. *Id.*

206. Hinnebusch, *supra* note 106, at 280.

207. *Id.*

208. Fay, *supra* note 106, at 61.

209. Dana Adams Schmidt, *U.S. Views Aswan as a Moscow Gain*, N.Y. TIMES, Jan. 20, 1960,

Egypt.²¹⁰ One study estimates that Egypt saved 71.7 million Egyptian pounds by taking the Soviet loan over the IBRD loan.²¹¹ Once Egypt had accepted Soviet financing for the first stage of the dam, it greatly increased the odds that it would accept Soviet help for the second stage, which is exactly what happened.²¹² Soviet funding was prescient since Nasser experimented with socialist policies during the 1960s.²¹³ Since the Aswan High Dam was the key to influence in the Middle East, the Soviet Union was not about to attack it based on its threat to heritage.

3. *United States and Great Britain*

The United States did not object to the Aswan Dam because it was pursuing similar projects—building dams that threatened archaeological and historical sites. After World War II, the United States started building a series of dams to control flooding throughout the country.²¹⁴ Naturally, they threatened cultural property in those areas, and the Smithsonian responded by funding investigations of the sites.²¹⁵ Congress then passed the Reservoir Salvage Act of 1960, which provided funds for studying relics that were going to be drowned.²¹⁶ It was not until nine years later with the National Environmental Policy Act that Congress would require authorities to consider the fate of relics at every planning stage.²¹⁷ Therefore, it seems that at the time of the Aswan proposal, the United States operated under the same assumptions that Egypt did. That is, states could destroy cultural property, but if they did, they should try to protect what they could. If they could not protect it, they would at least document it. In Egypt, this expectation meant asking the outside world for help. In the United States, it meant reallocating the budget money for preservation. Therefore, the United States did not believe in a prohibition against destroying cultural property. Some other motive was at play.

In contrast, the British position on relics destruction was ambiguous because the government did not own most of the relics in its jurisdiction. Many states vested title for discovered relics in the government. However, Great Britain was a country with a strong tradition in property rights, so it provided for compulsory sale instead. This meant that the government's primary role was to stop private individuals from desecrating heritage sites rather than ordering the ultimate destruction itself. It is conceivable that the state might have purchased private property to destroy relics for some development plan, but there is not enough information to conclude either way.

at A9.

210. *Soviet Fiscal Offer to Egypt Confirmed*, *supra* note 112.

211. SHIBL, *supra* note 99, at 91.

212. Nine days after the start of construction on the dam, Egypt accepted the Soviet offer to finance the second stage of the project. *Soviet to Finance Aswan 2nd Stage*, N.Y. TIMES, Jan. 19, 1960, at A1.

213. Elmusa, *supra* note 100, at 182-84.

214. Charles R. McGimsey III & Hester A. Davis, *Chapter 13: United States of America*, in *APPROACHES TO THE ARCHAEOLOGICAL HERITAGE*, *supra* note 19, at 116, 118.

215. *Id.* at 118-19.

216. *Id.* at 119.

217. *Id.*

However, American and British actions indicate that their opinions on cultural heritage were irrelevant. Like the Soviets, they viewed the dam as a means of shaping politics in the Middle East.²¹⁸ The United States and Great Britain had tried to win Egypt's allegiance, but Egypt rejected overt pressures to take sides in the Cold War.²¹⁹ Therefore, the Aswan High Dam offered a unique window of opportunity because it would have allowed the Western powers to strengthen ties with Egypt indirectly. Up until this point, Egypt had tried to minimize its dependence on any one country by diversifying its sources of aid.²²⁰ It could not finance the dam this way, however, because both sides would have conditioned their loans on the exclusion of the other.²²¹ This is precisely why the competition to finance the dam was so fierce. Given what was at stake, the two Western powers would have certainly ignored threats to the cultural heritage. This is supported by the fact that the two countries disregarded seriously unfavorable information about the dam and granted Egypt its loan before the loan conditions had been fulfilled.²²² The decision demonstrates just how much they wanted to influence Egypt.

E. *Appraisal*

This case is appropriate for analyzing the norm against destroying relics because of the enormity of the threat and the widespread involvement of the international community. Because so many countries joined in the salvage effort, this suggests that they may have believed that states could not destroy their own relics. While states did not directly challenge Egypt's right to build the dam, this silence is not definitive. International actors may have kept quiet for other reasons even if they had thought Egypt's actions were illegitimate. In the present case, the United States, Great Britain, and the Soviet Union were driven by Cold War considerations, while Sudan was motivated by development needs. However, even these states assigned importance to cultural property in their own domestic policies and contributed to the rescue campaign. This suggests that international actors did not regard cultural property lightly and that states could only destroy it for good reason. Economic necessity was one of those reasons.

Beyond this basic conclusion, it is difficult to say what other duties a host state might have at this point. Note that the world's reaction might have been different if some of the variables in this case had been changed. This was an easy case of economic need because Egypt's population was clearly outstripping the food supply. International actors might have been less willing

218. *U.S. Ready to Finance Part of Nile and Jordan Projects*, *supra* note 112.

219. For instance, in 1954, Egypt was unwilling to compromise when Britain tried to condition her withdrawal from Egypt on Egypt joining the Baghdad Pact. The Baghdad Pact was an alliance among Great Britain, Turkey, Iran, Iraq, and Pakistan against the Soviet Union. The British had to negotiate different terms before they left. Fay, *supra* note 106, at 60.

220. Hinnebusch, *supra* note 106, at 281.

221. When the United States and Great Britain initially agreed to give Egypt a grant, Soviet exclusion from participation was implicit in the offer. See *Russia Still Offering Egypt Help on Dam*, *supra* note 118.

222. The IBRD, which was essentially controlled by the Allies, found that Egypt would have had to pursue a rigid austerity plan in order to build the dam and that in the end, the standard of living would have been the same. COOKE, *supra* note 107, at 6, 9.

to go along with the plan if the need had been less pressing. Another factor might also have been Egypt's own commitment to its cultural heritage. It took the initiative to appeal for outside help, and it spent a good deal of its own time and money to mitigate the negative effects. If Egypt had shirked the responsibility and relied solely on the kindness of strangers, international actors might have been less forthcoming with their aid. Another consideration was that the world did not perceive a malicious purpose behind the forced migration of the Nubians. If it had thought that this was Egypt's attempt to ethnically cleanse the Nubian population, there might have been greater protest. Finally, dams were considered the best technology at the time, and so there was no push to consider other alternatives. If actors knew then what we know now, there might not have been so much support for the dam. In short, a change in any or all of these factors might have caused global participants to speak up and object to the dam's construction, even if Sudan and the superpowers did not. As we shall see in the following case studies, a lack of good faith in efforts to preserve or to explore less disruptive alternatives is a major factor in whether the world perceives an incident of relics destruction as illegitimate.

Now we turn to a slightly different case—one in which the state touted its mission for economic (socialist) reform, but which the world viewed quite differently.

III. CASE 2: CEAUSESCU'S SYSTEMIZATION PROGRAM AND THE THREAT TO ROMANIA'S ARCHITECTURAL HERITAGE (1971-1989)

A. *Introduction*

Systemization was a policy of the Romanian Communist government under Nicolae Ceausescu, in which the government collectivized farms and redesigned communal living space to implement Marxist principles. In the process, the government gutted Bucharest and destroyed numerous villages in the name of systemization, provoking strong protests from around the world. This Article includes it as an example of iconoclastic relics destruction even though it was an economic plan because international actors viewed it as something much more than economic; they viewed it as a form of repression against those who resisted Communism in Romania. Iconoclasm, as noted earlier, is the annihilation of icons as a means of destroying the messages behind them. In the Romanian case, the government destroyed rural villages and historic districts not only to enable communal living but also to eliminate the independent spirit of rural villagers and ethnic minorities. In other words, the destruction was iconoclastic because it purposefully targeted symbols of difference as a threat to the collective adoption of socialism. International actors recognized this political motive, which is why they did not accept the destruction as a necessary evil as they apparently did in the case of the Aswan High Dam. By contrast, world reaction here shows that it is apparently more acceptable for a host state to destroy relics for economic purposes if there is a lack of political vindictiveness. If the government appears to be targeting

cultural heritage that is important to a specific group, world actors will probably view it as iconoclastic and illegitimate.

B. *Facts*

1. *Context*

When Nicolae Ceausescu came to power in 1965, he was determined to set Romania on the path to political and economic independence. Although Romania participated in socialist endeavors, such as the Warsaw Pact and the Council for Mutual Economic Cooperation (COMECON), Ceausescu made it a point to distance Romania from the Soviet Bloc. As a result, and to the consternation of the Soviet Union, Romania established diplomatic relations with West Germany; maintained relations with Israel after the Six Day War; denounced the Soviet invasion of Czechoslovakia; continued its relationship with China after the Sino-Soviet split; refused to join the Soviet boycott of the Olympics in 1984; and attained membership in the General Agreement on Tariffs and Trade (GATT), the International Monetary Fund (IMF), and the World Bank.²²³ Western nations rewarded the maverick state by serving as its much needed creditors and trade partners.²²⁴

The first phase of economic reform in Romania called for rapid industrialization and collectivization. The Communists believed this would increase the standard of living in Romania by eighty percent.²²⁵ However, the government had to borrow heavily to finance its modernization program and found itself in an economic crisis by the 1980s.²²⁶ In response, Ceausescu instituted his economic austerity plan, in which he planned to pay back all of Romania's \$10 billion debt by the year 1990.²²⁷ He believed the debt was preventing Romania from becoming economically and politically independent, and began to ration supplies and export all the goods possible. "Systemization" became an important policy in Ceausescu's overall "solution" to the country's problems.

"Systemization" was a land reform policy aimed at achieving the most efficient use of urban and rural land.²²⁸ In the cities, the policy entailed building new apartments to accommodate workers and replacing old buildings with new structures.²²⁹ At first, this new construction did not affect historic sites because architects integrated them into urban development plans.²³⁰ However, by the mid-1960s more and more planners were beginning to believe that traditional architecture was "inefficient," "bourgeois," and had no

223. Craig G. Whitney, *Upheaval in the East: The Old Order*, N.Y. TIMES, Dec. 24, 1989, at A1; ROMANIA: A COUNTRY STUDY xxvi (Ronald D. Bachman ed., 1989).

224. Whitney, *supra* note 223.

225. Charles Sudetic, *Historical Setting*, in ROMANIA, *supra* note 223, at 1, 51.

226. Michael Meyer, *The Last Great Stalinist*, NEWSWEEK, Aug. 21, 1989, at 30.

227. Sherri Poradzisz, *The Society and Its Environment*, in ROMANIA, *supra* note 223, at 61, 139 (noting the size of the debt); Meyer, *supra* note 226 (announcing goal of debt repayment).

228. See generally DINU C. GIURESCU, *THE RAZING OF ROMANIA'S PAST* (1989) for an extensive review of Ceausescu's systemization policy.

229. *Id.* at 40.

230. *Id.* at 6.

function in a modern state.²³¹ Therefore, historic buildings were increasingly demolished as systemization took hold. Although rural systemization evolved a little bit differently, it was no less destructive. The 1974 Law for the Territorial, Urban and Rural Systemization directed authorities to reduce constructed areas in rural communities in order to increase the amount of farmland.²³² This was done by completely eliminating “unviable” villages, creating large agricultural communes, and forcibly relocating thousands of peasants to these communes.²³³

By all accounts, systemization was a modest program at its inception with only 3,000 targeted villages.²³⁴ However, Ceausescu greatly expanded that number in 1988 when he announced his intention to destroy half of the 13,000 Romanian villages.²³⁵ He justified the decree by claiming that it would lead to the more effective use of arable land, speed up homogenization of Romanian socialist society, reduce the main differences between town and country, and achieve a single society of working people.²³⁶ However, Romanian intellectuals disagreed and put themselves in danger by criticizing the land reform policy.²³⁷ It became a turning point for Romanian foreign relations because other states began to look critically at Romania’s internal policies.²³⁸

2. Threat

Systemization posed a direct threat to Romania’s cultural heritage because it entailed the complete destruction of historic districts in cities and entire villages.

In the cities, the government destroyed numerous buildings of cultural and historic merit, including churches and homes that reflected a varied mix of architectural styles.²³⁹ Many of the buildings also had historic roots in the community, revealing a rich and diverse past.²⁴⁰ For example, Habsburg architecture revealed that the towns of Sibiu and Brasov had once been centers of German culture.²⁴¹ However, the city of Bucharest was perhaps the most prominent victim since Ceausescu ordered the gutting of entire districts to

231. Michael Montgomery, *Ruler’s Edifice Complex Buries Romania’s Beauty in Concrete*, CHI. TRIB., Nov. 6, 1988, at A26.

232. GIURESCU, *supra* note 228, at 39.

233. Poradzisz, *supra* note 227, at 78.

234. *Id.* at 79; Nils Horner, “Beloved Leader” Allows No Dissent: A Plan to Destroy Half of Country’s 13,000 Villages, TORONTO STAR, Nov. 26, 1988, at D6.

235. Horner, *supra* note 234.

236. Poradzisz, *supra* note 227, at 76 (describing urbanization driven by Marxism); Horner, *supra* note 234 (touting efficient use of land and minimizing differences).

237. GIURESCU, *supra* note 228, at 51 (noting that at least five letters were sent to the authorities between October 1985 and May 1986); Daniel Johnson, *People Power Topples the Tyrant*, SUNDAY TELEGRAPH, Dec. 24, 1989, at A11 (noting that six dissidents risked their lives by publishing an open letter criticizing systemization); Whitney, *supra* note 223.

238. Alan Hamilton, *Exile King of a Tormented Land; King Michael of Romania*, TIMES (London), Dec. 19, 1989, at A6.

239. The periods represented include neoclassical, neo-Gothic, eclectic, neo-Romanian, Bauhaus, Cubist, Gothic, Renaissance, and Baroque. GIURESCU, *supra* note 228, at 4.

240. *Id.* at 5 (4-8 percent of town surfaces were covered by historical buildings).

241. Judy Dempsey, *Ceausescu’s Bulldozers Ready to Bury Rich Heritage*, FIN. TIMES, Sept. 1, 1988, at A2.

make way for, among other things, a 1,000-room palace (the "House of the People"), a triumphal road named the Victory of Socialism Boulevard, and a colossal new civic center.²⁴² One author writes, "[T]he 'House of the People' . . . designed as Ceausescu's personal palace . . . is beyond kitsch. Fronted by a formless, hemicycle space that can hold half a million people, the building is so big (its reception area is the size of a soccer field), so ugly, so heavy and cruel and tasteless, that its only possible value is metaphorical."²⁴³ The few buildings that did survive were dismantled and moved behind rows of tenements so that they could not be seen.²⁴⁴ Architects were so alarmed at the breadth of destruction that they began omitting certain buildings from the design models to prevent Ceausescu from ordering their demolition.²⁴⁵ Many other towns suffered the same fate as Bucharest.²⁴⁶

In the countryside, the threat to rural heritage was not to historic buildings but to the vernacular architecture instead. Vernacular architecture refers to the common building style of a period or place, and in this case means the traditional Romanian village. The Romanian villages reflected the mix of minority inhabitants and their traditional way of life, which had remained unchanged for centuries. This type of architecture is important because it informs us about the traditions and routines of daily life in a rural community.²⁴⁷ These elements were usually lost in the process of modernization.²⁴⁸ Although cultural heritage includes "groups of separate or connected buildings which . . . are of outstanding universal value from the point of view of history, art, or science,"²⁴⁹ they are generally less well protected than monuments because the general population does not recognize their value.²⁵⁰ The International Committee on Monuments and Sites (ICOMOS) confirmed this interpretation and expressed concern over Ceausescu's actions.²⁵¹

3. *Reaction*

Systemization received considerable international criticism. Among the critics were Austria,²⁵² Canada,²⁵³ France,²⁵⁴ Great Britain, Hungary, West Germany, and various non-governmental organizations (NGOs).

242. Destroyed sites included the Ypsilanti Palace, an eighteenth century Brincovenese hospital, and eighteen churches and monasteries. Matei Lykiardopol, *The Mutilation of Bucharest*, UNESCO COURIER, Jan. 1990, at 27.

243. Tony Judt, *Romania: Bottom of the Heap*, N.Y. REV. BOOKS, Nov. 1, 2001, LEXIS, Nexis Library, News Group File.

244. Lykiardopol, *supra* note 242.

245. Jim Molnar, *Romania—Scarred by Bullets, Doubts*, SEATTLE TIMES, June 17, 1980, at J1.

246. For example, in Pitești, only nine historic buildings remained out of more than a hundred. GIURESCU, *supra* note 228, at 44.

247. International Committee on Monuments and Sites, *supra* note 36.

248. *Id.*

249. World Heritage Convention, *supra* note 15.

250. International Committee on Monuments and Sites, *supra* note 36.

251. Horner, *supra* note 234.

252. Austria, Britain, and Canada put pressure on Romania at the Vienna Conference for the Security and Cooperation in Europe. Peter Hoffer, *Romania 'Scraps Plans to Bulldoze 7,000 Villages'*, DAILY TELEGRAPH, Oct. 18, 1988, at A10.

253. *Id.*

254. France recalled its ambassador from Romania. *Romania's Darkness*, ECONOMIST, Apr. 22,

Hungary and West Germany vocally opposed the plan because it adversely affected large numbers of Hungarians and Germans living in Transylvania (southwest Romania).²⁵⁵ Since Romania had a history of suppressing ethnic identity, the two countries believed that Ceausescu was targeting the villages as a method of forced assimilation.²⁵⁶ West Germany responded by recalling its ambassador from Romania and trying to buy out ethnic Germans attempting to leave the country.²⁵⁷ West Germany repatriated 11,000 people annually,²⁵⁸ paying between 4,000 and 10,000 Deutsch marks per person.²⁵⁹ On the Hungarian side, Karoly Grosz, the Hungarian party leader, tried to negotiate with Ceausescu, only to be ignored.²⁶⁰ Not only did Ceausescu fail to negotiate but he closed the Hungarian consulate in Transylvania in response to protests by Hungarians in Budapest.²⁶¹ Exasperated, Hungary filed an official complaint with the U.N. Human Rights Commission on conditions in Romania.²⁶² However, the people needed relief immediately, so Hungary broke its border agreement with Romania to facilitate refugee passage to Hungary.²⁶³ This was a historic moment, because never before had large numbers of refugees fled one communist country for another.²⁶⁴

Great Britain also criticized the systemization policy harshly. At the Vienna Human Rights Conference, the British delegation pushed Romania to stop the destruction, but Romania ignored its protests.²⁶⁵ As a result, the British Foreign Secretary wrote a diplomatic letter to his Romanian counterpart to express concern about the effect on human rights and cultural heritage.²⁶⁶ The House of Commons wanted to recall its ambassador and rescind Ceausescu's honorary knighthood, but the Foreign Secretary thought this would be going too far.²⁶⁷ In the end, the Ministry of State terminated official contacts because they believed that talking to Romania was like "having a dialogue with the deaf."²⁶⁸ The Ministry repeatedly tried to bring systemization up at official meetings, but Ceausescu was determined to move ahead with his policy. The Prince of Wales therefore decried:

I am aware of, and support, the moves made both by the British Government and its

1989, at 16.

255. Poradzisz, *supra* note 227, at 80 (The Hungarian minority comprises 7.8 percent of the total population and is the largest ethnic group in Romania. Germans comprise 1.5 percent and are the next largest group.).

256. Dempsey, *supra* note 241; Meyer, *supra* note 226.

257. Dempsey, *supra* note 241; *Romania's Darkness*, *supra* note 254. See also *Pogrom in Romania*, *ECONOMIST*, Sep. 3, 1988, at 15.

258. ROMANIA, *supra* note 223, at xxvii.

259. Judt, *supra* note 243.

260. Sergiu Verona, *Government and Politics*, in ROMANIA, *supra* note 223, at 242; Meyer, *supra* note 226.

261. ROMANIA, *supra* note 223, at xxviii.

262. *Id.* at xxviii.

263. Paula Butturini, *Romanians fleeing to Hungary*, *CHI. TRIB.*, Mar. 28, 1989, at A5.

264. *Id.*

265. Robin Gedye, *Howe Protests at Romanian Terror Against Peasants*, *DAILY TELEGRAPH*, Sept. 21, 1988, at A12.

266. *Id.*

267. *The Day in Brief*, *GUARDIAN*, Apr. 13, 1989, at A6.

268. Gedye, *supra* note 265.

European partners to bring pressure on the Romanian government to reverse its policies. The 20th century has witnessed some strange aberrations of human spirit, but few can match the activities of rulers who boast about their patriotism and then systematically undertake the destruction of the cultural heritage of their people. The extraordinary cultural diversity of Romania is not only part of their natural wealth, but a possession of inestimable value to all of humanity.²⁶⁹

It was this speech that focused the world's attention on the Romanian situation.

NGOs quickly responded by challenging and raising awareness about systemization. The most notable organizations that formed were the Campaign to Protect Rural Villages in Romania and the *Opération Villages Roumains*. These two groups encouraged towns and villages in other countries to "adopt" Romanian villages. The meaning of the adoption was left to each sponsoring town, but the NGOs encouraged people to write to ambassadors, to Ceausescu, and to the mayor of their adopted villages; to send food and other goods; and to visit their adopted places.²⁷⁰ Although the NGOs did not reach their goal of getting all 13,000 villages adopted, the public response was still impressive. Six hundred towns in France, 300 towns in Belgium, 100 towns in Switzerland, and an unspecified number in Britain participated and adopted villages.²⁷¹ At the very least, the NGOs succeeded in raising awareness about Romania's land reform program.

4. Outcome

Even though systemization ended a year later, it is difficult to know what effect the pressure had. In 1989, Ceausescu was captured after a popular uprising in Timisoara and tried for "crimes against the people." A military tribunal found him guilty and had him executed, paving the way for his former underling Ion Iliescu to seize power. Iliescu promised to outlaw the Communist Party and to institute further reforms, but considerable damage had already been done.²⁷²

In the aftermath, independent actors began to rebuild the nation and to increase awareness about cultural property. The first step was rebuilding. To this end, Romania acquired a loan from the World Bank to reconstruct some of its Saxon villages.²⁷³ When events had calmed down, some of the peasants went back to their villages, asked for the return of their land, and started over

269. *Devouring the Soul of a Nation*, TIMES (London), Apr. 28, 1989, at A16 (quoting the Prince of Wales's speech to the Civic Trust's Building a Better Britain exhibition).

270. Nick Cohen, *Protest Comes to Archers Country: The Model for Ambridge and a Village in Romania Have United Against Threats to Their Ways of Life*, INDEPENDENT, July 15, 1989, LEXIS, Nexis Library, News Group File; Hugo Davenport, *Vowchurch Versus the Stalinist Bulldozers*, DAILY TELEGRAPH, June 7, 1989, at A21.

271. Max Prangnell, *West Steps up Battle to Save Romanian Villages; Heritage Protest*, TIMES (London), June 25, 1989, at A9.

272. ROMANIA, *supra* note 223, at xxxi (describing the events of the uprising and aftermath). Among the villages affected were Suceava, Botosani, Pascani, Iasi, Roman, Piatra-Neamt, Bacau, Vaslui, Husi, Birlad, Tecuci, Focsani, Galati, Rimnicul-Sarat, Buzau, Mizil, Ploiest, Slatina, Craiova, Rminicul Vilcea, Giurgiu, Slobozia, Calarasi, Medgidia, Tulcea, Constanta, Mangalia, and Baia Mare. GIURESCU, *supra* note 228, at 47.

273. Alan Hamilton, *Prince is a Hero in a Land of Bloody Villains*, TIMES (London), Nov. 5, 1998, at A5.

again.²⁷⁴ Private foundations, such as the Foundation of German Heritage in Romania and the Mihai Eminescu Trust, formed in order to help Romania in its recovery efforts.²⁷⁵ The outside money certainly helped, even after the increased budget the government allocated for reconstruction.²⁷⁶ Furthermore, Romania made a conscious effort to train people in conservation because so many skilled technicians and craftsmen had fled the country during the communist era. The country could only sustain its heritage by building up its human capital. Along with these reconstruction efforts, Romania also tried to raise awareness at the international level. In 1990, Romania acceded to the World Heritage Convention and since then has had six sites inscribed on the World Heritage List.²⁷⁷ This development is encouraging, given that some countries do not have even one listed site.

C. Analysis of Claims

1. Ceausescu's Claims

Ceausescu's main rationale for systemization was that he was merely following Marxist ideology.²⁷⁸ In his 1848 *Communist Manifesto*, Karl Marx laid out different methods for raising the proletariat to the position of the ruling class.²⁷⁹ These methods included:

[the] extension of factories and instruments owned by the State; the bringing into cultivation of waste lands and the improvement of the soil generally in accordance with a common plan [The] combination of agriculture with manufacturing industries; [and the] gradual abolition of the distinction between town and country, by a more equitable distribution of population over the country.²⁸⁰

For Marx, it was important to minimize the differences between the peasants and the workers in order to bring the peasants into the proletariat.²⁸¹ Marx went on to say that "this [could] not be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production."²⁸²

274. Jane Perlez, *Where Communists Trampled, a Village Rises*, N.Y. TIMES, Oct. 18, 1994, at A4.

275. International Committee on Monuments and Sites, *Heritage at Risk: Romania*, http://www.international.icomos.org/risk/roman_2000.htm (last visited Dec. 5, 2002).

276. *Id.* The Minister of Culture obtained a bigger budget.

277. International Committee on Monuments and Sites, *supra* note 36.

278. One Romanian diplomat declared that "Karl Marx mentioned the countryside and towns should be homogenized in his 1848 Communist Manifesto, and Ceausescu firmly had a mind to do it." Barrie Penrose, *Where the Bulldozers are Rewriting History; Destruction of Villages in Romania*, TIMES (London), Nov. 27, 1988, at A20.

279. Friedrich Engels explains in *Principles of Communism*, which was the basis for the *Communist Manifesto*, that "the proletariat is that class of society which procures its means of livelihood entirely and solely from the profit derived from any capital from the sale of its labor and does not draw profit from any kind of capital The proletariat or the class of proletarians, is, in a word, the working class of the nineteenth century." Friedrich Engels, *Principles of Communism*, in MARX ENGELS: COLLECTED WORKS 341 (Progress Publishers 1984).

280. KARL MARX, *The Communist Manifesto*, in THE MARX-ENGELS READER 352 (Robert C. Tucker ed., 1972).

281. *Id.*

282. *Id.*

The evidence suggests that Marxism was indeed a factor in Ceausescu's decision to pursue systemization. Ceausescu appears to have been serious about collectivization because his government turned Romania into the most centralized socialist state in the communist world.²⁸³ Moreover, the newly constructed communes did provide the villagers with some benefits. For example, the buildings were larger, more durable, and more comfortable, and modern amenities, such as radio, television, and gas stoves became common in the home.²⁸⁴ In addition, the income of state farm workers approached the income of urban laborers by the 1980s.²⁸⁵

However, evidence also indicates that faithfulness to Marx was not the only factor at play. The most telling sign is that the government allocated very little money to agrarian reform even though it was supposed to be the key to Romania's economic recovery.²⁸⁶ Instead, the government poured copious amounts of money into other projects, such as the remodeling of Bucharest, leaving very little funds to do anything else.²⁸⁷ If a government's budget is a reliable indicator of its priorities, then collectivization seems to have been low on the list. Not only did the government fail to build many new replacement villages but the ones it did build suffered from a lack of investment. The relocated villagers complained of a shortage of bathrooms, sewerage, running water, and food.²⁸⁸

The other claim Ceausescu made was that Romania's cultural heritage was actually growing. At the Twelfth Party Congress of the Romanian Communist Party, Ceausescu stressed that numerous literary and art books had been published during that time, and he called upon writers, composers, and artists to continue creating works of "revolutionary humanism."²⁸⁹

However, Ceausescu's claim is inaccurate at best, and self-serving at worst, because even if we accept that this new art was cultural heritage, cultural heritage cannot be substituted interchangeably. Relics are not fungible because they accumulate over time, and they acquire their significance from particular historical moments. Additionally, the most that could be said of this new art was that it was national patrimony. National patrimony and cultural heritage are distinct in that the former has local appeal, while the latter is of "outstanding universal value." Although a full discussion of "outstanding universal value" is outside the scope of this paper, the term implies a widespread consensus on the value of a relic.²⁹⁰ Since much of the world was opposed to Communism at that time, it is unlikely that Romania's new

283. Ronald Bachman, *The Economy, in ROMANIA*, *supra* note 223, at 187.

284. GIURESCU, *supra* note 228, at 21.

285. Bachman, *supra* note 283, at 184.

286. Charles Kneivt, *Bulldozing Romania's Past*, *TIMES* (London), Jan. 4, 1989 at A8.

287. *Id.* (quoting a U.S. State Department official who stated: "There has been no change in policy, just a shortage of cash to put it into effect across the country right now. The bulldozers are still busy in the capital, although nothing is being razed outside for the time being.").

288. GIURESCU, *supra* note 228, at 21.

289. *Report of Nicolae Ceasescu*, BBC SUMMARY WORLD BROADCASTS, Nov. 22, 1979, LEXIS, Nexis Library, News Group File.

290. "Relic" is the term used in conventional archaeological practice. "Relic" is different from "antiquity" in that the age of an object is unimportant in assessing whether something is of cultural value. Therefore, objects from the recent past might be considered relics. PROTTE & O'KEEFE, *supra* note 17, at 4.

“creative” work could be considered cultural heritage in the traditional sense. At most, it had claims of national importance.

2. Counterclaims

An immediate objection to systemization was that it threatened cultural heritage. Urban heritage often had historic or architectural value because it spanned a range of centuries and artistic styles. Systemization endangered the properties because urban planners did not incorporate them into their designs for modern cities. Similarly, the policy posed a risk to rural heritage because the village itself would be completely devastated. Ceausescu intended for half of the villages to be destroyed without regard for the vernacular architecture.

In addition, global participants believed that systemization violated human rights. Hungary and West Germany specifically objected to the treatment of ethnic Hungarians and ethnic Germans, while others voiced general anxiety about the fate of peasants.²⁹¹ Government actions that adversely affected minorities were circumspect because Romania had a history of forcefully assimilating its minorities and of restricting emigration.²⁹² Delegates at the Conference on Security and Cooperation in Europe (CSCE) made much the same criticisms of the land reform policy.²⁹³ Romania's behavior at the Vienna Conference on Security and Cooperation in Europe (CSCE) only confirms this interpretation. During the Vienna Conference, the delegates reviewed numerous human rights provisions, which Romania invariably tried to delete.²⁹⁴ When the delegates finally reached a consensus, Romania declared that it would not abide by the portions dealing with human rights.²⁹⁵ Hence, Romania's behavior at the time, in addition to its historical mistreatment of minorities, supports the claim that it was trying to destroy ethnic communities.

One could argue that systemization was not meant to discriminate against the Hungarians and Germans because the policy was broadly directed. The policy affected villages and cities all over the country, not just the ones in Transylvania. However, this argument would be misplaced because systemization violated the rights that Romanians had by virtue of their humanity. Human rights are based on the individual and not on membership in a particular group. As individuals, the Romanians were denied, *inter alia*, the

291. Davenport, *supra* note 270 (“According to Hugh Arbuthnott, recently Britain's ambassador to Romania, Ceausescu's aim is ‘to reduce the independence of the peasants and put them into a more collective way of living, in order to create the new Socialist Man.’”); Poradzisz, *supra* note 227, at 80. See also *supra* Subsection III.B.3. (noting the positions of West Germany and Hungary).

292. During the “Hymn to Romania” Campaign, the government changed all ethnic place names, destroyed monuments linked to minority groups, and distorted history books in order to glorify Romania. Poradzisz, *supra* note 227, at 88; ROMANIA, *supra* note 223, at xxviii. The government also restricted foreign-language media and educational study, and had the secret police monitor all long-distance telephone calls. In addition, Romania discouraged emigration because it believed it was unpatriotic and devoid of political consciousness. Poradzisz, *supra* note 227, at 89-92. How this operated in effect was that the government would deny visa applications and then have the minority applicant demoted, fired, interrogated, or called into military service. ROMANIA, *supra* note 223, at xxvii.

293. Hoffer, *supra* note 252.

294. *Id.*

295. ROMANIA, *supra* note 223, at xxviii.

right to privacy; to move freely; to own property; to realize their economic, social, and cultural rights; and to have an adequate standard of living.²⁹⁶ Hence, the human rights claim cannot be summarily dismissed, and indeed has strong resonance.

D. *The Role of Cultural Heritage in Decision-Making*

1. *Hungary*

It is plausible that Hungary objected to Romania's actions because of its commitment to cultural property. At the time of systemization, Hungary had a good record for protecting cultural heritage, including vernacular architecture. Hungary had maintained institutions for listing and protecting historic monuments since the late nineteenth century.²⁹⁷ Interest in preservation carried forward from then and took hold from the 1960s through the 1980s.²⁹⁸ In 1987, Hungary had the seventeenth-century village of Hollókő inscribed on the World Heritage List, which UNESCO heralded as "an outstanding example of a deliberately preserved traditional settlement."²⁹⁹ The inscription, a direct result of a government renovation program,³⁰⁰ was significant because Hungary had needed to ensure "adequate legal and/or traditional protection and management mechanisms" for proper conservation.³⁰¹ Hungary must have seen great value in the rural village in order to have made such a commitment. More recently, Hungary had adopted the Convention for the Protection of the Architectural Heritage in Europe ("Granada Convention"), and it had also issued orders to protect built areas.³⁰² It would not be surprising to find that Hungary had thought Romania lacked the right to destroy vernacular heritage.

However, Hungary's indignation was informed not by cultural heritage issues, but rather by the closely-related question of human rights. This concern was apparent from Hungary's statements at the time, and supported its tumultuous history with Romania. The Hungarian government publicly berated Ceausescu and a senior minister, Imre Pozgay, explicitly called systemization a "crime against humanity."³⁰³ The conflict over systemization

296. All of these rights are included in Articles 12, 13, 17, 22, and 25 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948). See *supra* notes 291 and 292 and accompanying text for a description of living conditions and state oppression.

297. Zoltan Ero, *Cultural Heritage and Urban Planning in Hungary, 2001*, at http://www.arcchip.cz/w03/w03_ero.pdf (last visited Dec. 5, 2002) (mentioning that Hungary had "a strong background of the conservation practice").

298. *Id.*

299. See, e.g., <http://whc.unesco.org/archive/repcom87.htm#401> (last visited Dec. 5, 2002).

300. Committee of Ministers of the Council of Europe (1996), *Report on Cultural Heritage Policies in Europe: Hungary*.

301. UNESCO, *Establishment of the World Heritage List*, at <http://www.unesco.org/whc/opgulist.htm> (last visited Dec. 5, 2002).

302. For example, Hungary has promulgated Order No. 25/1992 (1.28) korm., governing the ministries in charge of monument conservation, and the Order of the Ministry for Environment and Regional Policy No. 7/1992 (III.21), which governs built-up sites. Committee of Ministers of the Council of Europe, *supra* note 300.

303. Butturini, *supra* note 263; Mathew Glass, *Hungary Fights to Stop Rape of Rural Romania; Plan to Raze Villages and Create "Agro-Industrial Complexes,"* TIMES (London), Aug. 28, 1988, at A15.

was just another in a series of problems between the two countries. Hungary and Romania each believed they had the moral high ground because of wrongs committed by the other—mainly, that Hungary had oppressed the Romanians when it controlled Transylvania and that Romania was persecuting Hungarians now that it had control.³⁰⁴ Regardless of the truth of their claims, however, Hungarians did flee the country in droves during the systemization period to seek asylum in Hungary.³⁰⁵ In need of help, Hungary joined the U.N. High Commission for Refugees and lodged a formal complaint against Romania.³⁰⁶ Given this, it would seem that human rights—the rights of the Hungarian minority in Romania—were foremost on Hungary's mind.

2. *West Germany*

During this era, West Germany had also shown a rising interest in relics preservation. It fascinated the German public,³⁰⁷ and this fascination was reflected in the ease with which excavators could get government funding. The legislature appropriated the money for exploration with little or no debate.³⁰⁸ It also promulgated statutes to preserve architecture that was in the public interest,³⁰⁹ as well as *Gruppen städtischer Gebäude*, or groups of buildings.³¹⁰

However, West Germany was mainly driven to protest because of its concern for persecuted ethnic Germans. This was evident from its struggle to repatriate and reunite families. From 1978 to 1988, West Germany helped 11,000 people emigrate annually, and this was not inexpensive. Romania's exit tax made it virtually impossible for ethnic Germans to leave, and as a result, West Germany subsidized each emigrant by about \$5,000.³¹¹ It is unlikely that any state would have made such a commitment unless it had really feared for the safety of its group members. In light of these facts, human rights provided the primary reason for West Germany's action.

3. *Great Britain*

Of the states that protested, only Britain was acting, at least in part, out of a substantial concern for cultural property. Because of its imperial history and control of foreign territory, Great Britain had a great deal of experience with archaeology and tended to assign importance to it.³¹² Parliament passed

304. Sudetic, *supra* note 225, at 3 (describing the repression of Romanian majority in Transylvania); *id.* at 56 (detailing the effect of Romanianization on Hungarians).

305. Butturini, *supra* note 263.

306. *Id.*

307. Reichstein, *supra* note 35, at 45.

308. *Id.*

309. The Federal Construction Act of 1986 specifies that "streets and buildings of historical, artistic or urban development interest" are in the public interest and are to be taken into account in master plans. *Id.* All monuments protection laws apply to architectural, archaeological, and artistic monuments that are in the public interest. *Id.* at 40.

310. Committee of Ministers of the Council of Europe, *supra* note 300.

311. Verona, *supra* note 260, at 243.

312. For example, Great Britain established antiquities departments in her mandate areas following World War I. D.T. Potts, *The Gulf Arab States and Their Archaeology*, in *ARCHAEOLOGY UNDER FIRE: NATIONALISM, POLITICS AND HERITAGE IN THE EASTERN MEDITERRANEAN* 91 (Lynn

the first monuments law in 1882, and passed successive like statutes until the 1979 Ancient Monuments and Archaeological Areas Act.³¹³ Especially advanced provisions of the English policy were the consideration of archaeology in economic development plans; the balancing of rights between private property owners and the state; the prohibition on metal detectors; and the designation of conservation areas, which could include towns or villages.³¹⁴ The government also created agencies, such as English Heritage and the Royal Commission on Ancient and Historical Monuments, to manage cultural resources.³¹⁵ As a general matter, Great Britain's management scheme showed a commitment to vernacular heritage.

More specifically, England's conservation areas demonstrated that the country cared about the type of heritage threatened in Romania—rural villages and townscapes. According to the Civic Amenities Act of 1967 and the Town and Country Planning Act of 1971, planning authorities could designate conservation areas of special architectural or historical interest.³¹⁶ Any activity that might affect the buildings in the protected area needed to be approved by the local planning authority.³¹⁷ This strongly supported the concern British actors expressed for Romania's heritage, because most countries did not even consider vernacular heritage to be worthy of protection.³¹⁸ In his famous speech, the Prince of Wales lamented how difficult it was "to remain silent as the peasant traditions and ancient buildings of a fellow European society [were] bulldozed."³¹⁹ The prince went on to argue for the protection of the English villages because they were threatened by England's own developers.³²⁰ Thus, it seems that Great Britain's protests over systemization were driven, in part, by an expectation that states should not destroy their own heritage.

4. *Non-Governmental Organizations*

Although NGO activities revolved around preserving the villages, the groups were probably mostly concerned about the negative effects of systemization on people. Among other things, the NGOs encouraged the adopting towns to send goods, write letters, and to visit. The widespread response to the adoption campaigns suggests that people were the main issue since vernacular heritage was not well-known or well-valued throughout the world.

Meskeil ed., 1998) (explaining that differences in commitment to heritage in Middle Eastern countries are a result of their different colonial histories).

313. For a thorough review of monuments and heritage legislation in Great Britain, see Henry Cleere, *Great Britain*, in *APPROACHES TO THE ARCHAEOLOGICAL HERITAGE*, *supra* note 19, at 54-55.

314. *Id.* (outlining the important segments of the Ancient Monuments and Archaeological Areas Act of 1979); Andrew Saunders, *Heritage Management and Training in England*, in *ARCHAEOLOGICAL HERITAGE MANAGEMENT IN THE MODERN WORLD*, *supra* note 201, at 152-53 (describing the provisions of the Town and Country Planning Act of 1971).

315. *Id.* at 153-55.

316. See Cleere, *supra* note 313, at 57; Saunders, *supra* note 314, at 153.

317. Saunders, *supra* note 314, at 153.

318. International Committee on Monuments and Sites, *supra* note 36.

319. John Grisby, *Prince's Plea to Halt Romanian Destruction*, DAILY TELEGRAPH (London), Apr. 28, 1989, at A2.

320. *Id.*

E. *Appraisal*

What the Romanian affair suggests is that politically-driven iconoclasm will receive greater outside scrutiny than economic development as a threat to heritage. This may be especially true if the iconoclasm appears to be a form of persecution against the disempowered. Even though economic and political issues were both involved in this case, international actors downplayed the legitimacy of development priorities because questionable political motives existed. However, just because human rights overshadowed cultural property as a reason for protest does not mean that cultural property was necessarily irrelevant. Rather, cultural heritage played two subsidiary roles. First, it acted in a supporting capacity as an additional reason to oppose systemization. When the Prince of Wales denounced the policy, he was making a plea to save the villages as well as to protect the people. Second, it informed the human rights issue because cultural property became a proxy for cultural rights. Cultural rights can be defined as "'rights to a culture' and . . . [include] rights to preserve, exercise or have access to a culture."³²¹ International actors saw the villages as an extension of the people and believed that the people had a right to their heritage. They did not necessarily want to preserve the villages for their own sake but for the sake of those with whom the villages were connected. It is this relational aspect of cultural heritage that distinguishes the present case from that of the Aswan High Dam. In the Romanian case, it was difficult to tell where the concern for people ended and where the concern for heritage began. In the Aswan case, international actors did not appear to associate Nubian relics with the living Nubian community. The Romanian case does not speak definitively on iconoclasm, but it suggests that others would find it objectionable.

There may be other reasons that political motives function differently than economic ones in justifying heritage destruction. It may be that political necessity is not as easy to evaluate as economic need. In the first case, Egypt's population was clearly going to outstrip the food supply if the government failed to act. In Romania, it was questionable whether systemization was needed at all because the Communist states themselves disagreed on the best way to implement Communism. Moreover, it may be that a given political path is never necessary because of the uncertain nature of politics itself. In that case, international actors might conceivably judge iconoclasm based on how much they agree with the motive, rather than how necessary it is to achieve a certain result.

So far, we have seen that economic necessity was a justifiable reason to destroy cultural property while political iconoclasm was not. However, how would people respond if the economic need were not so clear? The following case study takes up this question.

321. Lyndell V. Prott, *Understanding One Another on Cultural Rights*, in *CULTURAL RIGHTS AND WRONGS* 161, 165 (Halina Niec ed., 1998) (discussing the different conceptions of "cultural rights").

IV. CASE 3: THE ILISU DAM AND THE THREAT TO HASANKEYF (1982-2002)

A. *Introduction*

Turkey's construction of the Ilisu Dam is included in this Article because it is a case of economic development involving more modern-day preoccupations, such as the environment and human rights, which were not issues in the first Aswan High Dam case. As we have seen, many factors that influence the behavior of decision-makers are usually implicated in cases of relics destruction. However, the Aswan High Dam situation took place in the context of the Cold War, when geopolitical considerations often overshadowed all other issues, including cultural heritage. This contrasts sharply with the state of the contemporary world, in which international actors no longer react on the basis of the Communist threat. Therefore, world reaction to development projects threatening relics will be tempered by new expectations of lawfulness.

In this case, we find that economic development is still a legitimate reason for endangering the cultural heritage, as it was in the Egyptian case study. However, global participants are increasingly evaluating development based on a host state's economic need and good faith in pursuing the least intrusive means for accomplishing its goals. Since this case occurred after Romanian systemization, it also supports the notion that cultural heritage is a growing international concern because actors consistently mentioned cultural heritage as a reason for opposing the Ilisu Dam. By contrast, only some of the relevant actors thought destruction was problematic in the Romanian case, and they gave it far less weight. Thus, we may conclude that a host state can legitimately destroy relics for economic development in some cases, but they do not necessarily have a per se right to do so.

B. *Facts*1. *Context*

The Southeast Anatolia Project (GAP) is a regional development plan aimed at achieving sustainable development in the Tigris-Euphrates basin and the Upper Mesopotamia plains.³²² When it was originally conceived, the GAP was only concerned with increasing irrigation and energy, but it has now evolved into a multi-sector development approach, encompassing agriculture, infrastructure, transportation, industry, education, health, housing, tourism, and investment.³²³ In all, Turkey plans to build twenty-two dams, nineteen power plants, a number of irrigation channels, an agricultural college, as well as additional schools, roads, housing, and tourism facilities.³²⁴ Turkey is dedicated to the GAP because once complete, it would allow Turkey to

322. Embassy of the Republic of Turkey, *What Is Gap?*, at <http://www.gap.gov.tr/English/Frames/fr1.html> (last visited Dec. 5, 2002).

323. *Id.*

324. Juliet Nicholson, *Would We Let a Foreign Government Do This to Oxford?*, DAILY TELEGRAPH (London), July 14, 2001, at A3; Nadire Mater, *Culture-Turkey: Ancient Metropolis to Be Flooded*, INTER-PRESS SERVICE, Aug. 11, 1999, LEXIS, Nexis Library, News Group File.

control twenty-nine percent of its total water potential, produce twenty-two percent of its total energy output, and irrigate twenty percent of its land.³²⁵ The project would also create jobs for over three million people and triple the income in the region.³²⁶ The Ilisu Dam is the second largest dam in the GAP, and Turkey hails it for its projected hydropower benefits.³²⁷ Turkey estimates that the Ilisu Dam will supply five percent of the country's total energy needs.³²⁸

Unfortunately for Turkey, the Ilisu Dam was mired in controversy from the start. First, the dam threatened to cause war with Syria and Iraq because Turkey would be able to control the water supply to the two countries, which are lower riparian states.³²⁹ Water was a contentious issue for Syria and Iraq because they depend on transboundary waterways for their survival,³³⁰ and the Middle East had already faced a water shortage during the 1970s.³³¹ Even though Turkey assured the two countries that the dam would not affect the water supply greatly, the issue was too important to trust the assurances of a historical enemy.³³² The second problem with the dam was the impact that it would have on the Kurds. An estimated 78,000 Kurds would have to be relocated from the area,³³³ and opponents saw this as a method of discrimination.³³⁴ The Turkish government has had a policy of suppressing Kurdish identity, and its past disregard for the fate of the Kurds has only made the choice of the dam site more suspicious. A third problem with the Ilisu Dam was the negative impact it would have had on the environment, such as threatening endangered species, disrupting ecosystems, and increasing erosion, sedimentation, and waterborne disease.³³⁵ Although these environmental impacts are endemic to all dams,³³⁶ the size of the Ilisu project

325. Embassy of the Republic of Turkey, *GAP Components*, at <http://www.gap.gov.tr/English/Ggbilgi/gbilesen.html> (last visited Dec. 5, 2002).

326. Mater, *supra* note 324.

327. Nicholson, *supra* note 324, at A3.

328. *Ilisu Dam Threat to Cultural Heritage*, TURKISH DAILY NEWS, Dec. 4, 2001, http://www.turkishdailynews.com/old_editions/12_04_01/feature.htm.

329. Justin Huggler, *Time Running out for a Turkish Town the Millennium Passed By*, INDEPENDENT, Feb. 4, 2000, at 18.

330. Turkey's Minister of State acknowledged as much when he said, "In the coming decades, the most important resource in the Middle East will be water, much more valuable than oil. And we are the rich possessor of that resource." Diane Raines Ward, *In Anatolia, a Massive Dam Project Drowns Traces of an Ancient Past*, SMITHSONIAN, Aug. 1990, at 28, LEXIS, Nexis Library, News Group File. Almost 300 river basins and groundwater resources cross national borders. WATER IN THE MIDDLE EAST. 2 (Hussein A. Amery & Aaron T. Wolf eds., 2000).

331. WATER IN THE MIDDLE EAST, *supra* note 330, at xiii.

332. Former U.N. Secretary General Boutros Boutros-Ghali predicted that the next war in the Middle East would be fought over water, and the CIA identified water as the most likely cause of conflict in the region. Geoffrey Lean & Mark Rowe, *Blair's Support for Dam May Speed World's First Water War*, INDEPENDENT, Dec. 12, 1999, at 7. Turkey's President, Turgut Ozal, declared, "Let no one suspect our intentions. We have taken into account the needs and concerns of our neighbors. We will never use the control of water to coerce or threaten them." Ward, *supra* note 330.

333. George Monbiot, *They're All Damned: Britain Is Again Trying To Fund a Turkish Project to Flood Thousands of Homes*, GUARDIAN (London), Feb. 26, 2002, at 17.

334. Kevin Brown, *Turkey Rejects Criticisms in "Out-of-Date" DTI Reports*, FIN. TIMES, Dec. 21, 1999, at A2.

335. Ilisu Engineering Group, *Environmental Impact Assessment Report*, at 4-6 to 4-7 (2001), <http://www.ecgd.gov.uk/graphic/pubreports/ilisueiar.asp>.

336. World Commission on Dams, *supra* note 186.

made the potential consequences of this dam particularly severe.³³⁷ Finally, the dam threatened to submerge fifty-two villages and fifteen towns,³³⁸ including hundreds of archaeological sites.³³⁹ The most important site was Hasankeyf, a 10,000-year-old town where Turkish civilization in Anatolia began.³⁴⁰ Hasankeyf drew a lot of attention because of its Kurdish connection and its vast archaeological wealth. The government had even recognized Hasankeyf's significance by making it a protected site.³⁴¹

Because of these problems, the World Bank refused to fund the Ilisu Dam, and Turkey was forced to look for other sources of capital.³⁴² In 1996, Turkey tendered the project to foreign companies as a build-operate-transfer (BOT) undertaking and finally chose a consortium of multinational corporations and three Turkish companies.³⁴³ However, this was only the beginning of Turkey's effort to realize the dam project because once the bids were accepted, the companies had to secure their own financing. Export credit agencies (ECAs) were willing to make these types of loans, but they insisted on export credit guarantees issued by various governments. States were generally willing to underwrite these endeavors because they wanted to make their businesses competitive internationally. The ensuing battle over the Ilisu Dam occurred during this stage when governments were considering whether to issue these guarantees.

2. Threat

Opponents of the dam mourned the potential archaeological loss because the site area contained rare information about the intersection of Mesopotamian and Anatolian culture.³⁴⁴ Even though Turkey had 40,000 recorded sites,³⁴⁵ the proposed dam area suffered from a noticeable lack of research and documentation.³⁴⁶ If the dam were built, hundreds of sites from every historical age would have been left unstudied and completely lost to flooding.³⁴⁷ Those that were not would have been damaged by landslides,

337. The Ilisu Dam is Turkey's largest hydropower project. It will be 1820 meters long, 135 meters high, with a volume of 10.4 billion cubic meters, and a surface area of 313 square kilometers. Peter Bosshard, *Ilisu—a Test Case of International Policy Coherence*, Dec. 7, 2001, at <http://www.rivernet.org/turquie/ilisu.htm>.

338. Paul Brown, *Britain To Help Fund Dam That Will Wipe Out Kurd Area*, IRISH TIMES, Mar. 1, 1999, at A13.

339. Ilisu Engineering Group, *supra* note 335, at 7-10.

340. Huggler, *supra* note 329; Lean & Rowe, *supra* note 332.

341. Mater, *supra* note 324.

342. Bosshard, *supra* note 337.

343. Ilisu Dam Campaign, *Who's Behind the Dam? The Ilisu Consortium*, <http://www.ilisu.org.uk/compsum.html> (last visited Dec. 5, 2002). The companies chosen were Skanska (Sweden), Impreglio (Italy), Balfour Beatty (U.K.), ABB (Switzerland), Kiska (Turkey), Nurol (Turkey), and Tefken (Turkey). *Swedish Firm Pulls out of Turkish Dam Project*, ENV'T NEWS SERVICE, Sept. 29, 2000, LEXIS, Nexis Library, News Group File.

344. Karen Fitzgerald, *Before the Deluge: Dam Construction in Turkey Threatens Invaluable Archaeological Sites*, OMNI, Jan. 1995, at 16.

345. *Id.*

346. Ilisu Engineering Group, *supra* note 335, at 4-77.

347. Ilisu Dam Campaign, *The Archaeological Impacts of the Ilisu Dam*, <http://www.ilisu.org.uk/archaeo.html> (last visited Dec. 5, 2002) (including letter from World Archaeological Congress to Tony Blair (Jan. 16, 2001)).

erosion, and construction.³⁴⁸ Sites from the Neolithic, Chalcolithic, Neo-Assyrian, Late Roman, Byzantine, and later medieval periods would have borne the brunt of this devastation,³⁴⁹ although the loss of relics from more recent periods would have been devastating as well.³⁵⁰

Hasankeyf was the most significant of the endangered sites because it has been home to numerous civilizations during its 10,000-year existence.³⁵¹ Not much is known about the site, however, because the first excavations only began in 1986 through private efforts.³⁵² We do know that Hasankeyf was once an important trade center because it was located on the Silk Road to China.³⁵³ Under the Seljuk Turks, Hasankeyf became an affluent vassal state in which different cultures lived peacefully.³⁵⁴ This is evidenced by the fact that the different architectural styles were not fused together, but rather existed side by side so that buildings of Asian, Iranian, Roman, and Arabian design stood next to each other within the city.³⁵⁵

In addition, Muslims consider Hasankeyf to be a holy site. Imam Abdullah, the grandson of Mohammed's uncle, was buried there,³⁵⁶ and as a result, 30,000 Muslims make the trek annually to visit it and to pray for relief from sickness or infertility.³⁵⁷ Hasankeyf is also home to the Mausoleum of Zeynel Bey, which has religious significance for Muslims.³⁵⁸ Therefore, Hasankeyf was a religious and historical site.

Because Hasankeyf is a multilevel site (i.e., containing evidence from many time periods), archaeologists estimated they would need about one hundred years to research the town properly.³⁵⁹ Archaeology is not just the retrieval of objects but of information as well, which is why professionals must take care to study the entire context of clues.³⁶⁰ This takes time, which is exactly what archaeologists do not have in this case. The Ilisu Dam is predicted to flood Hasankeyf in about six years,³⁶¹ which means that excavators would only be able to save twenty percent of what is archaeologically valuable.³⁶² Moreover, many of the relics would be unsalvageable even if archaeologists had more time because some sites, such as cave settlements, are immovable.³⁶³ The Ilisu Dam would clearly have been a disaster for ancient Hasankeyf.

348. *Id.*

349. *Id.*

350. Relics from more recent periods bear directly on the history of indigenous peoples. *Id.*

351. These included the Abbasid, Artuklu, Commagenian, Persian, Roman, Byzantine, Akkoyunlu, and Ottoman empires. John Murray Brown, *Survey of Turkey's South Anatolian Project*, FIN. TIMES, July 24, 1992, at A10; Erdem Yucel, *Ancient Cultures of Anatolia in Jeopardy*, TURKISH DAILY NEWS, July 28, 2000, http://www.turkishdailynews.com/old_editions/06_28_00/feature.htm.

352. Professor Olus Arik began digging on his own initiative when he found out about the dam. Penny Young, *Hasankeyf: A City in Peril*, HIST. TODAY, Nov. 1, 2000, at 3.

353. Ward, *supra* note 330, at 28.

354. *Id.*

355. Young, *supra* note 352, at 3.

356. Ilisu Dam Campaign, *supra* note 347.

357. *Id.*

358. *Id.*

359. Ward, *supra* note 330, at 28.

360. *Id.*

361. Fitzgerald, *supra* note 344, at 16.

362. Huggler, *supra* note 329, at 18.

363. *Id.*

3. Reaction

In response to the threat, international actors pressed Turkey to implement salvage operations. Although Turkey discovered the threat to Hasankeyf in 1992, it did not ask for help to preserve it until four years later when it was ready to begin construction.³⁶⁴ The government allocated \$10,000 for excavation purposes, but this was grossly inadequate for the work that needed to be done.³⁶⁵ Due to all the outside pressure, the Ministry of Culture finally implemented a project to salvage the heritage of the Ilisu reservoir.³⁶⁶ The program is scheduled to run until 2006, and experts are supposed to save as much as they can before then.³⁶⁷ Six teams from the United States, Great Britain, Germany, and Turkey have already begun to dig.³⁶⁸ In addition, the government has plans to document a virtual Hasankeyf in CD-ROM format.³⁶⁹ So far, critics of the dam have not been impressed.

Syria and Iraq both condemned the Ilisu Dam because it threatened to reduce their water supply by 40 percent and 80 percent respectively.³⁷⁰ Furthermore, the lack of waste water treatment facilities in the Ilisu region might cause sewage in the reservoir to poison the water downstream.³⁷¹ When Syria and Iraq made their objections to Turkey, however, Turkey just ignored them and refused to negotiate.³⁷² The two countries were thus forced to take up their cause internationally, and the Arab League backed their position.

Besides addressing Turkey directly, Syria and the Arab League pressured states, such as Great Britain, not to underwrite the dam.³⁷³ Meanwhile, Iraq threatened to bring Turkey before an international tribunal if it did not terminate the project.³⁷⁴ Both countries probably thought that other states would be sympathetic because the Convention on the Law of the Non-Navigational Uses of International Watercourses, which protected the interests of lower riparian states, had just been concluded.³⁷⁵ Since there are almost 300,000 water resources that cross national boundaries throughout the world, other states were bound to take an interest in the outcome at Ilisu.³⁷⁶

364. *Watery Graves*, *ECONOMIST*, Apr. 29, 2000, at 23.

365. Brown, *supra* note 351, at A10.

366. Ilisu Engineering Group, *supra* note 335, at 7-12.

367. *Id.*

368. *New Excavation Underway in Southeast: Archaeologists Attempt to Save Historical Artifacts Located Where the Ilisu Dam is to Be Constructed and Document Those Unable to Be Recovered*, *TURKISH DAILY NEWS*, July 20, 2000, http://www.turkishdailynews.com/old_editions/07_20_00/feature.htm.

369. *Critical Ilisu Dam Decisions Expected by Year's End*, *TURKISH DAILY NEWS*, Nov. 6, 2000, http://www.turkishdailynews.com/old_editions/11_06_00/feature.htm.

370. Gwyn Rowley, *Political Controls of River Waters and Abstractions Between Various States Within the Middle East*, in *WATER IN THE MIDDLE EAST*, *supra* note 330, at 220.

371. Fred Bridgland, *Damned by a £1.25 Billion Disaster*, *SUNDAY HERALD*, July 16, 2000, at A16.

372. Quentin Peel, *Turkey Infrastructure: Communication Gaps Hinder Dam Project: South-Eastern Anatolia Project*, *FIN. TIMES* (London), Apr. 15, 2000.

373. Paul Brown, *Ilisu Dam in Jeopardy as Balfour Drops out: Mortal Blow for Controversial Pounds 1.25bn Project Flooding Kurds' Land*, *GUARDIAN*, Nov. 14, 2001, at A10.

374. *Ilisu Dam Causes Whitehall Strife*, *FIN. TIMES NEWSLETTERS*, Jan. 14, 2000, at 12.

375. *Convention on the Law of the Non-Navigational Uses of International Watercourses: Report of the Sixth Committee Convening as the Working Group of the Whole*, U.N. GAOR, 51st Sess., U.N. Doc. A/51/869 (1997).

376. *WATER IN THE MIDDLE EAST*, *supra* note 330, at 2.

For eleven years, NGOs pressured the Turkish government, international organizations, businesses, and states in the hopes that the cumulative effect would cause Turkey to change its development plans.³⁷⁷ The NGO network included Friends of the Earth, the Kurdish Human Rights Project, Turkish Volunteers for Ancient Hasankeyf, Save Hasankeyf, the Ilisu Dam Campaign, and the Anatolia Foundation. The Anatolia Foundation filed a petition in the Ankara Administrative Court demanding that the construction contracts be annulled.³⁷⁸ In its petition, the foundation alleged that Turkey was violating "the European Convention the Protection of Archaeological Inheritances [sic], which was signed by the Turkish government in 1999."³⁷⁹ NGOs approached the U.N. and the European Union to speak out against Turkish actions.³⁸⁰ They also applied to the European Union and the European Council to have Hasankeyf inscribed on the European Continent Cultural Heritage List.³⁸¹

After these actions failed, NGOs changed their tactic and began focusing on businesses and governments directly. Despite all the problems with the Ilisu Dam, many states were still considering whether to issue export credit guarantees in the amount of \$850 million.³⁸² NGOs petitioned these governments to underwrite loans for alternative projects with varying success. Even though the Swedish company, Skanska, pulled out of the project,³⁸³ the U.S. government approved a \$100 million loan guarantee to Balfour Beatty.³⁸⁴ Great Britain also seemed likely to follow suit.³⁸⁵

NGOs lodged perhaps the most formidable response because they went after the parties most likely to help Turkey realize its goals. Since the English company Balfour Beatty had a large stake in the venture, NGOs concentrated on the corporation and the British government in their last pitch to stop the Ilisu Dam. The World Archaeological Congress wrote a letter to Tony Blair condemning the Ilisu Dam and requesting British withdrawal of support.³⁸⁶ Friends of the Earth (FoE) threatened legal action against the British government,³⁸⁷ prompting official promises to conduct and make public an environmental impact statement about the dam.³⁸⁸ The government also

377. Insi Hukum & Yahya Kocoglu, *A Civilization that Drowns in its own Waves: Hasankeyf*, TURKISH DAILY NEWS, Aug. 1, 1999, http://www.turkishdailynews.com/old_editions/08_01_99/feature.htm.

378. *Eastern Turkey Dam Project Threatens Heritage Site*, KURDISH OBSERVER, Jan. 18, 2000, reprinted in BBC SUMMARY OF WORLD BROADCASTS, Jan. 20, 2000, LEXIS, Nexis Library, News Group File.

379. *Id.*

380. Justin Huggler, *Man Who Dares to Challenge the Turkish State*, INDEPENDENT, Nov. 6, 1999, at A19.

381. Hukum & Kocoglu, *supra* note 377.

382. Austria, Germany, Italy, Japan, Portugal, Switzerland, the United States, and Great Britain were all considering whether to issue export credit guarantees. *Swedish Firm Pulls out of Turkish Dam Project*, *supra* note 343.

383. Skanska had a twenty-four percent stake in the venture. *Id.*

384. Sam Fleming, *Balfour Beatty Pulls Out of \$2.2bl Turkish Dam Plan*, BLOOMBERG NEWS, Nov. 13, 2001, LEXIS, Nexis Library, News Group File.

385. Stephen Byers, the British trade and industry secretary, publicly stated that he was "minded to grant export credits." *Ilisu Dam Causes Whitehall Strife*, *supra* note 374, at 12.

386. Ilisu Dam Campaign, *supra* note 347 (quoting letter from Tony Blair to Turkish Prime Minister).

387. *Ilisu Dam Causes Whitehall Strife*, *supra* note 374.

388. *Friends of the Earth: Government "Minded" to Support Dam*, M2 PRESSWIRE, Dec. 22,

conditioned approval of the guarantee on the resolution of four issues: (1) a resettlement plan for the Kurds; (2) provisions for a water treatment plant to maintain water quality; (3) adequate downstream flows to Iraq and Syria; and (4) a detailed plan to save the archaeological heritage.³⁸⁹ FoE was probably aided by the fact that there was dissension within the British government on this subject. Prime Minister Tony Blair and the Department of Trade and Industry favored approving the guarantee while the ministers thought approval would violate Britain's "ethical foreign policy."³⁹⁰ FoE also brought direct pressure on Balfour Beatty by buying \$43,000 worth of shares in the company and tabling a proposal for the company to consider human rights and environmental issues when taking on projects.³⁹¹ The British battle over the Ilisu Dam looked like it would be the toughest.

4. Outcome

Due to the coordinated effort of the NGOs, Turkey will not be building the dam any time in the near future. The major stakeholders in the venture all backed out of their commitments although none would admit that it was a result of public pressure.³⁹² Skanska, with a twenty-four percent share in the project, pulled out in September 2000,³⁹³ while the Italian company Impreglio withdrew itself a year later.³⁹⁴ However, Balfour Beatty's retreat dealt the final blow to the project because it had a thirty-one percent stake in the Ilisu Dam.³⁹⁵ Although Balfour Beatty claims it was a business decision, the company's chief executive officer commented that it would have never gotten involved if it had known how controversial the project was going to be.³⁹⁶ With Balfour out of the picture, it meant that only one of the four foreign corporations and three local companies were left on the construction side. While the civil engineering side remained intact, Turkey is hard-pressed to

1999, LEXIS, Nexis Library, News Group File.

389. Paul Brown, *Dam Could Lose Pounds 200m Aid: Report on Controversial Turkish Project Which Would Destroy Historic Sites Says Conditions for British Backing Have Not Been Met*, GUARDIAN, July 4, 2001, at A5.

390. *Id.*; Paul Brown, *MPs Blast Plan for Ilisu Dam*, GUARDIAN, July 20, 2000, at A13; Orya Sultan Halisdemir, *Britain Approves Ilisu Dam Project, with Conditions*, TURKISH DAILY NEWS, Dec. 23, 1999, http://www.turkishdailynews.com/old_editions/12_23_99/feature.htm; Dipankar De Sarkar, *Development Rights: UK Gov't Urged to End Aid for Turkish Dam*, INTER-PRESS SERVICE, Mar. 3, 1999.

391. *Turkish Dam Critic Plots Shareholder Revolt*, ENV'T NEWS SERVICE, Mar. 22, 2001, <http://kurdishnews.homestead.com/month.html>; *Unorthodox Shareholders Challenge Ilisu*, WATER POWER & DAM CONSTRUCTION, May 31, 2001, at 6.

392. Balfour's chief executive officer said, "With appropriate solutions to commercial, environmental and social issues still unsecured and no early resolution likely, Balfour Beatty believes that it is not in the best interests of its stakeholders to pursue the project further." Skanska said that it "will abstain from participating in construction projects when, in our judgement, a project will result in serious risks to the environment or society." Saeed Shah & Paul Waugh, *Balfour Beatty Pulls Out of Turkish Dam Project*, INDEPENDENT, Nov. 14, 2001, at A13.

393. *Swedish Firm Pulls out of Turkish Dam Project*, *supra* note 343.

394. Brown, *supra* note 373.

395. *Ilisu Dam Campaign, Swedish Company Pulls out of Ilisu Dam*, Sept. 26, 2000, <http://www.ilisu.org.uk/news2.html>.

396. Company chairman, Lord Weir stated, "If we had known then how controversial this project would be we could have saved ourselves a lot of trouble by not taking part in it, but this was not the case at the time." Paul Brown, *Kurds Threaten Dam Contractor*, GUARDIAN, May 3, 2001, at A16.

finance the project by itself, which means the Ilisu Dam is effectively dead.³⁹⁷ As recently as February 2002, the Swiss bank, UBS, retracted its former commitment to the dam, citing the adverse environmental and social impacts.³⁹⁸ Nonetheless, Turkey claims that it will continue with the project.³⁹⁹

C. Analysis of Claims

1. Turkey's Claims

Turkey's arguments for the Ilisu Dam were basically arguments for GAP as a whole since the dam was one part of the general plan. Among other things, Turkey hoped to accelerate development, decrease regional disparities, encourage urban growth, and promote its exports.⁴⁰⁰ It aspired to become a major industrial power by decreasing its reliance on agriculture and expanding its industry and service sectors.⁴⁰¹ Turkey's goals were made more difficult by its dependence on other nations, however, because it was importing \$2 billion worth of oil per year and was mired in external debt.⁴⁰² Developing water resources seemed to be one solution because Turkey had particular control over the Euphrates River,⁴⁰³ and the river had sufficient volume for exploitation at a low cost.⁴⁰⁴

Southeast Anatolia was the focus of the development program because the area lagged drastically behind other parts of the country. The effected area made up 9.7 percent of Turkey's total area, but it was the most underdeveloped region in the country.⁴⁰⁵ This was problematic because the region's urban population was growing faster than the national average while the rural population was slowly decreasing.⁴⁰⁶ Therefore, inhabitants of the region had fewer resources, and they were taxing these resources at a more strenuous rate. The disparity between Anatolia and the rest of Turkey would have increased if the government had failed to intervene. One consequence of the GAP then would have been to promote intragenerational equity among the

397. Leyla Boulton & Kevin Brown, *Balfour Pulls out of Turkish Dam Project*, FIN. TIMES, Nov. 14, 2001, at 8.

398. *Swiss Bank Pulls out of Controversial Turkish Dam Project*, AGENCE FRANCE-PRESSE, Feb. 27, 2002, LEXIS, Nexis Library, News Group File.

399. Brown, *supra* note 373.

400. Turkish Ministry of Foreign Affairs, *Objectives of G.A.P.*, <http://www.mfa.gov.tr/grupd/dc/dcd/gap.htm> (last visited Dec. 5, 2002).

401. Turkish Ministry of Foreign Affairs, *How Will GAP Change the Socio-Economic Structure of the Region?*, at <http://www.mfa.gov.tr/grupd/dc/dcd/gap.htm> (last visited Dec. 15, 2002).

402. Ward, *supra* note 330.

403. *Id.* Turkish Minister of State Kamran Inan said, "In the coming decades, the most important resource in the Middle East will be water, much more valuable than oil. And we are the rich possessor of that resource." *Id.*

404. WATER IN THE MIDDLE EAST, *supra* note 330, at xiii.

405. Turkish Ministry of Foreign Affairs, *The G.A.P. Region*, at <http://www.mfa.gov.tr/grupd/dc/dcd/gap.htm> (last visited Dec. 15, 2002). The southeast is Turkey's poorest region. Louis Meixler, *Letter from Hasankeyf: Kurds in Political Battle to Save Their Heritage*, BIRMINGHAM POST, Oct. 12, 1999, LEXIS, Nexis Library, News Group File.

406. In 1997, the urban growth rate was 4.6% compared to the 2.9% national average. The rate of rural population decline was -0.5% in Anatolia and -7% in the entire country. Turkish Ministry of Foreign Affairs, *Socio-Economic Characteristics of the GAP Region*, at <http://www.mfa.gov.tr/grupd/dc/dcd/gap.htm> (last visited Dec. 15, 2002).

Turkish people. Turkey found international criticism all the more frustrating because it had previously been criticized for *not* developing the area.⁴⁰⁷

Although there is not much reason to doubt Turkey's sincerity in wanting to develop the region, its choice of a dam is questionable since the drawbacks of large dams are now well known. True, Turkey aspired to be a major world economy, and GAP evolved over many decades as a rational economic solution.⁴⁰⁸ However, Turkey should have reconsidered its original plans in light of the conclusions made by the World Commission on Dams—namely, that dams are *not* an efficient way to increase power or irrigable land.⁴⁰⁹ They fail to produce as much electricity, provide as much water, or control as much flood damage as planners once thought.⁴¹⁰ And to make matters worse, they cause additional problems, such as the displacement of people and the destruction of the natural and cultural environment.⁴¹¹ Unlike Egypt's decision to build the Aswan High Dam, Turkey had other, perhaps better, available alternatives for dealing with the energy pressure. For instance, it could have improved demand-side management and energy distribution. Turkey's transmission system was notoriously inefficient,⁴¹² and modernizing it would have been a more effective and less costly way to deal with the energy pressure.⁴¹³ Moreover, projects like the gas-field Ankara Power Project had the potential to increase energy output while being three times more cost effective than the proposed dam.⁴¹⁴ Since hydropower is not as clean as once thought, Turkey could have considered other forms of energy, such as "dry grass," and sun, which could produce as much energy as the dam.⁴¹⁵ However, Turkey did not consider any other options besides the

407. Douglas Frantz, *As Price of Progress, Turkish Villages Are Flooded*, N.Y. TIMES, Aug. 21, 2000, at A3.

408. Turkey had studied the development of water resources from the 1960s and consolidated her plans into the Southeast Anatolia Project in 1977. Turkish Ministry of Foreign Affairs, *History of Southeastern Anatolia*, at <http://www.mfa.gov.tr/grupd/dc/dcd/gap4.htm> (last visited Dec. 15, 2002).

409. World Commission on Dams, *supra* note 186, at ix ("Large hydropower dams tend to perform closer to, but still below, targets for power generation . . ."); *id.* at 7 ("Irrigation components of large dam projects . . . fell well short of targets in terms of development of command area (and infrastructure), area actually irrigated, and to a lesser extent the intensity with which areas are actually irrigated.").

410. *Id.* at 20 ("Water supply dams . . . have generally fallen short of intended timing and targets for bulk water delivery . . ."); *id.* at 24 ("While rare, dam breaks have and do occur and usually during exceptional storms . . . Significant downstream damage to communities has resulted where reservoirs have not operated properly in times of emergency.").

411. Forty to eighty million people have been displaced by dams worldwide. *Id.* at xxx. Compensation to these individuals is often inadequate, and little attention is paid to restoring these people's livelihoods. *Id.* at 105. Indigenous and tribal peoples are the ones most likely to bear this cost and reap the fewest benefits. *Id.* at 110. In terms of environmental impacts, dams destroy natural habitats, plant and animal species, and fishing resources, *id.* at 75, 82, and they may emit the same amount of greenhouse gases as thermal power plants. *Id.* at 75. Finally, large dams devastate cultural property by disturbing the cultural resources of local communities and inundating relics and sites. *Id.* at 166.

412. Ilisu Dam Campaign, *The Ilisu Dam—There Are Alternatives!*, <http://www.ilisu.org.uk/altern.html> (last visited Dec. 15, 2002).

413. Bosshard, *supra* note 337.

414. The gas-fired Ankara Power Project generated energy at a cost of \$0.38 per megawatt, whereas the Ilisu Dam generated energy at a cost of \$1.27 million per megawatt. Ilisu Dam Campaign, *supra* note 412.

415. Hukum & Kocoglu, *supra* note 377.

dam.⁴¹⁶ As we shall see, this, combined with the credible counterclaims of the dam's opponents, made Turkey's claims of economic necessity less powerful than Egypt's claims in the 1950's.

2. Counterclaims

International actors have asserted the four counterclaims noted above: the dam (1) threatened to cause a water war with Syria and Iraq; (2) would have an adverse effect on the environment; (3) deliberately discriminated against the Kurds; and (4) would destroy valuable cultural property. Most of these issues have already been discussed at length above and will not be repeated here. However, the Kurdish claim is worth mentioning again because it was one of Turkey's main domestic preoccupations and likely played a role in its choice of the dam site.

The government's treatment of the Kurds throughout the development process is suspect because of its well-known problems with the ethnic group.⁴¹⁷ In the past, Turkey has tried to assimilate the Kurds because their large numbers made them a threat to national unity.⁴¹⁸ This resulted in Turkey's fifteen-year civil war with the separatist group, the Kurdistan Worker's Party (PKK).⁴¹⁹ The war has been a serious strain on the government and has been a major reason for the lack of foreign direct investment.⁴²⁰ Critics charge that Turkey was trying to control the southeast region because it was a base of operations for the PKK. Turkey denies this, but the government has already taken over villages in the dam area it suspects of supporting the PKK and refuses to pay the residents compensation.⁴²¹ In addition, its disregard for the Kurds in previous GAP projects is especially revealing. When Turkey built the Birecik Dam, it not only failed to resettle the Kurds, but also failed to tell them when the water was coming.⁴²² The Kurds only learned of it when the water reached their villages, forcing them to flee with only the things they could carry.⁴²³ The government also failed to consider the Kurds in the Ilisu proposal until financing became conditioned upon an acceptable resettlement plan.⁴²⁴ When Turkey finally devised a plan, the compensation scheme made it likely that most Kurds would get nothing.

416. Nicholson, *supra* note 324.

417. For a history of the Kurdish conflict in Turkey, see MICHAEL M. GUNTER, *THE KURDS AND THE FUTURE OF TURKEY* (1997).

418. Eric Hoogland, *Chapter 2: The Society and Its Environment*, in *TURKEY: A COUNTRY STUDY* 98 (Helen Chapin Metz ed., 1995).

419. *Id.* at 100 (the PKK initiated armed insurrection in 1984). The PKK has since agreed to pursue a peaceful resolution. Jonathan Gorvett, *Kurdish Rebels' Call to End War Meets Hope, Distrust in Turkey*, *BOSTON GLOBE*, Aug. 17, 1999, at A11.

420. GUNTER, *supra* note 417, at 127.

421. Andrew Woodcock, *Turks Apologize to MPs in Passports Row*, *PRESS ASS'N*, July 16, 2000, LEXIS, Nexis Library, News Group File.

422. Mark Thomas, *Guess What Happened as They Started Electioneering: Out Came a Few Reports that Ministers Would Prefer to Hide*, *NEW STATESMAN*, May 21, 2001, at 23.

423. *Id.*

424. A condition of the British export credit guarantee was that Turkey provide for Kurdish resettlement. Brown, *supra* note 389. Turkey therefore appointed a local firm with little experience in resettlement to handle the plan. Ilisu Dam Campaign, *The Social Impacts of the Ilisu Dam Project*, <http://www.ilisu.org.uk/social.html> (last visited Dec. 15, 2002).

Payment was to be based on legal title to property, which meant that the large landowners would have reaped a windfall at the expense of the minority group.⁴²⁵ In short, evidence for the complaints was well-documented, and Turkey even acknowledged them. Mithat Rende, of the Turkish embassy in London, said, "[W]e acknowledge that there are some problems, and we must address these problems, but we have seven years to do it before the dam is built."⁴²⁶

The fact that the government did not try to alleviate the above effects supports the various counterclaims. Global participants obviously thought that the costs of the dam warranted some mitigation, and this was seen as feasible. Two Turkish research organizations concluded that Hasankeyf could have been saved if the dam site were moved a little to the northeast and that the northeast was a more appropriate site for the dam anyway.⁴²⁷ Authorities could have also lowered the reservoir level by forty meters, which would have cut energy output by 500 mega-watts, but would have still generated 3,200 mega-watts of electricity.⁴²⁸ However, Turkey refused to make even slight modifications to the dam proposal, which bolsters the argument that Turkey was not acting in complete good faith. It may have needed to generate more energy, but did it need to do it in this way? Several actors thought not.

D. *The Role of Cultural Heritage in Decision-Making*

The main actors in the controversy included Syria, Iraq, and the financing states, as well as international businesses, export credit agencies (ECA), and NGOs. The latter non-state categories are increasingly relevant as global participants because they can affect the way that states behave. Private businesses and ECAs have become indispensable to development schemes because governments have retreated from providing services directly and have come to focus on regulating private undertakings.⁴²⁹ NGOs have also become influential in world affairs because they often fulfill needs that governments cannot.⁴³⁰ This analysis therefore interprets NGO motives for objecting to the Ilisu Dam.

425. Bridgland, *supra* note 371; see also Peter Bosshard, *A Test Case of International Policy Coherence: A Case Study Of The Ilisu Hydropower Project (Turkey)*, House of Commons, Select Committee on Trade and Industry, 6th Report, App. to Minutes of Evidence, App. 4 (Feb. 28, 2000), <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmtrdind/200/200ap07.htm>.

426. Brown, *supra* note 377.

427. Hukum & Kocoglu, *supra* note 377.

428. Mert Gozde, *Southeastern Impressions 4: Two Things Are Plaguing the Citizens of Batman: Hasankeyf and Suicides*, TURKISH DAILY NEWS, Oct. 21, 2000, http://www.turkishdailynews.com/old_editions/10_21_00/feature.htm.

429. Hilal Elver, *World Commission on Dams Report Challenges Financing for Ilisu Dam Project*, TURKISH DAILY NEWS, Mar. 20, 2001, http://www.turkishdailynews.com/old_editions/03_20_01/feature.htm.

430. Norimitsu Onishi, *Non-Governmental Organizations Show Their Growing Power*, N.Y. TIMES, Mar. 22, 2002, at A10.

1. *Syria and Iraq*

Syria and Iraq both consider cultural heritage important as reflected in their antiquities laws.⁴³¹ However, it is clear from their reaction that they were motivated primarily by the water issue because Turkey had a strong motive to punish and weaken both countries. Syria and Iraq made diplomatic objections based, not on the impact to cultural sites, but rather the potential decrease in water flow and water quality that would result from the dam.⁴³² They could not trust Turkey because they have traditionally had unfriendly relations. An important point of conflict between Syria and Turkey was Syria's support of the PKK.⁴³³ Turkey believed that Syria let the PKK keep a training base in Lebanon and allowed rebel leaders to live freely in Syria.⁴³⁴ In fact, Turkey once threatened to cut off the water supply to Syria in 1989 because of this belief.⁴³⁵ In addition, Syria had an irredentist claim on Turkey because France ceded part of Syria's territory to Turkey when it was a French mandate.⁴³⁶ Iraq similarly enraged Turkey by supporting the Kurdish rebels.⁴³⁷ Were it not for the foreign support, the PKK might have agreed to a ceasefire sooner than it did. Syria and Iraq may have also considered the effect that Turkey's increased energy capabilities would have on their military and strategic relations.⁴³⁸ Once Turkey controlled the river outflows, there would be no guarantee that it would not use the control to its advantage.

2. *Non-Governmental Organizations*

NGOs were very much influenced by the fact that cultural heritage was going to be destroyed. Although many of the NGOs existed for other purposes, at least a few groups formed to address specifically the threat to Hasankeyf, for example the Turkish Volunteers for Ancient Hasankeyf and Save Hasankeyf. For these groups, relics were intimately tied to their founding missions. Currently, the Turkish Volunteers are trying to create a permanent foundation for protecting cultural heritage in Anatolia, and the community has been receptive.⁴³⁹ Organizers have received many offers to sponsor the new foundation, but they wish to remain independent.⁴⁴⁰ Although some NGOs might have been primarily interested in the environment or human rights, they invariably included cultural heritage in their protests about the dam. Eight NGOs commissioned an environmental impact report, and in it they specifically mentioned cultural heritage destruction as a reason for

431. For a summary of Syria and Iraq's antiquities laws, see PROTTE & O'KEEFE, *supra* note 17.

432. John Kolars, *The Spatial Attributes of Water Negotiation: The Need for a River Ethic and River Advocacy in the Middle East*, in WATER IN THE MIDDLE EAST, *supra* note 330, at 252-53.

433. John Gummer, *A Guaranteed Error of Judgment*, FIN. TIMES, Dec. 16, 1999, at A25.

434. Eric Hoogland, *Chapter 4: Government and Politics*, in TURKEY, *supra* note 418, at 316.

435. Lean & Rowe, *supra* note 332.

436. Hoogland, *supra* note 434.

437. Jean R. Tarter, *National Security*, in TURKEY, *supra* note 418, at 306.

438. *Connections with Middle East Policies*, TURKISH DAILY NEWS, Aug. 1, 1999, http://www.turkishdailynews.com/old_editions/09_01_99/feature.htm.

439. *A Civilization That Drowns in its Own Waves*, TURKISH DAILY NEWS, Aug. 1, 1999, http://www.turkishdailynews.com/old_editions/08_01_99/feature.htm.

440. *Id.*

opposing the dam.⁴⁴¹ In addition, NGOs relied upon cultural heritage conventions as a basis for their legal actions. The Anatolia Foundation invoked the European Convention on the Protection of Archaeological Heritage when it petitioned the Turkish court for relief.⁴⁴² The Foundation also tried to seek special protective status for Hasankeyf under the European and UNESCO conventions.⁴⁴³

However, cultural property was but one concern of NGOs. Many of them had already been in existence to address environmental or human rights concerns.⁴⁴⁴ Since the dam would have caused such severe social and environmental damage, it is safe to conclude that they were primarily concerned with these two issues. This is not to say that cultural heritage was a *de minimus* factor, but rather it was fused into these respective causes.

With respect to the first, international actors viewed relics destruction as an environmental impact because the "environment," broadly speaking, consisted of both natural and cultural resources. UNESCO solidified this conception in the World Heritage Convention by treating cultural and natural heritage equally, recognizing that they were twin concerns. Even the British government recognized the connection between the cultural and natural environment.⁴⁴⁵ Therefore when NGOs included relics in their environmental impact statements they were following an established practice.

Human rights groups had a somewhat different perspective, however. From their perspective, access to relics formed an important cultural right of the Kurds. The World Archaeological Congress took the position that depriving people of objects from their past would cause them to suffer "demonstrable traumatic effects."⁴⁴⁶ This was especially true for those groups that were already marginalized by the larger society.⁴⁴⁷ Therefore, special attention had to be given to living communities that had claims to the cultural heritage. In this case, the Kurds had a right to be consulted about the fate of Hasankeyf because their connection to the town was widely known. Human rights groups were sensitive to Hasankeyf's fate because of its independent value but also because of the invidious purpose they saw behind Turkey's

441. The eight groups were Corner House Research (United Kingdom), Campaign an Eye of SACE (Italy), Pacific Environment (United States), World Economy, Ecology, and Development (Germany), Ilisu Dam Campaign, Kurdish Human Rights Project (United Kingdom), Friends of the Earth (United Kingdom), and the Berne Declaration (Switzerland). Review of Environmental Impact Assessment Report (EIAR), <http://www.foe.co.uk/resource/reports/ilisu-eia-summary.pdf> (last visited Dec. 5, 2002).

442. *Eastern Turkey Dam Project Threatens Dam Heritage Site*, KURDISH OBSERVER, Jan. 20, 2000, reprinted in BBC SUMMARY OF WORLD BROADCASTS, Jan. 20, 2000, LEXIS, Nexis Library, News Group File. The newspaper reported that the foundation invoked the European Convention on the Protection of Archaeological Inheritances, but no such convention exists. This Article assumes that it meant the convention for the archaeological "heritage."

443. Hukum & Kocoglu, *supra* note 377.

444. E.g., Friends of the Earth and the Kurdish Human Rights Project.

445. The environmental impact report commissioned by the British Department of Trade and Industry devotes many pages to the Ilisu Dam's impact on cultural heritage. Ilisu Engineering Group, *supra* note 335, at 4-77 to 4-79, 7-8 to 7-16.

446. Ilisu Dam Campaign (quoting letter from the World Archaeological Congress to Tony Blair), *supra* note 347.

447. *Id.*

actions.⁴⁴⁸ It was reasonable to believe that protecting the cultural heritage would help advance cultural rights.

3. *International Businesses*

International businesses supported the Ilisu Dam because they stood to make a profit. They only bowed to the public pressure because of the business consequences of participation and not because of the environmental, social, or cultural issues per se. Balfour Beatty, for example, justified its decision to withdraw in terms of the interests of the stakeholders.

Balfour's chief executive said that "with appropriate solutions to commercial, environmental and social issues still unsecured and no early resolution likely, Balfour Beatty believes that it is not in the best interests of its stakeholders to pursue the project further."⁴⁴⁹ It was suitable to withdraw at that point because Balfour's involvement had not started yet, and the shareholders had nothing to lose.⁴⁵⁰ Impreglio made similar claims as Balfour Beatty,⁴⁵¹ while Skanska refused to give any reasons at all.⁴⁵² One could argue that the companies *were* concerned about the dam's negative effects since they withdrew from the project. However, the controversy had been going on for at least eleven years, and these issues were raised from the project's inception. If businesses had really cared, they could have backed out well before the last public campaign. That they did not suggests that the dam's effect on their image was an important business consideration.

4. *Export Credit Agencies*

Similarly, export credit agencies (ECAs) were driven by profit motive. This was evident from their lenient standards for loan approval. Unlike most banks, including the World Bank, ECAs did not have policies considering the environmental and social consequences of development projects.⁴⁵³ For that reason, developing countries often sought loans from ECAs, and ECA lending increased fourfold between 1988 and 1996.⁴⁵⁴ ECAs now provide almost \$1.5 billion for development projects annually,⁴⁵⁵ inevitably funding proposals that no one else will, and some of these probably impact the cultural heritage.⁴⁵⁶ In their defense, however, ECAs have often provided much needed capital to countries to obtain food, water, and power.⁴⁵⁷ In this case, the ECAs were willing to finance the dam despite all the public pressure, indicating that cultural heritage did not play a part in their decision-making.

448. Hukum & Kocoglu, *supra* note 377; Nicholson, *supra* note 324.

449. Shah & Waugh, *supra* note 392, at 11.

450. Fleming, *supra* note 384.

451. Boulton & Brown, *supra* note 397, at 1.

452. *Swedish Firm Pulls out of Turkish Dam Project*, *supra* note 343.

453. Elver, *supra* note 429.

454. Nancy Dunne, *Export Credit Agencies See Business Soar*, FIN. TIMES, Feb. 4, 1999, at A6.

455. Elver, *supra* note 429.

456. Dunne, *supra* note 454.

457. Elver, *supra* note 429.

5. *States*

This controversy does not illuminate how states felt about cultural heritage destruction because the question became moot before it was answered. Skanska, Impreglio, and Balfour Beatty all dropped out of the project before many states had made a decision about underwriting the dam.⁴⁵⁸ Because of the widespread protest, any decision made by a state could not have been free from internal disagreement.

The British experience, at least, informs us how business interests could have prevailed over all other concerns. In Britain's case, it was widely speculated that Tony Blair tried to trump the ministers because of commercial considerations.⁴⁵⁹ If Great Britain nurtured close ties with Turkey, British companies might have benefited from contracts to repair Turkey's earthquake-damaged infrastructure.⁴⁶⁰ More importantly, they might have gained valuable defense contracts.⁴⁶¹ This "aid-for-trade" accusation was especially damaging because the previous government was involved in a similar scandal, in which the Conservative government made aid for the Pergau Dam in Malaysia dependent on defense contracts for fighter aircraft.⁴⁶² After that secret agreement came to light, the political fallout was severe.⁴⁶³ The Blair government probably had this in mind when it decided to condition its export credit guarantee on four factors, and as a result, it was in an awkward position when Turkey failed to meet any of the four conditions.⁴⁶⁴ Had Britain guaranteed the project anyway, there would have been political consequences. Nonetheless, the government never had to take a definitive position because Balfour Beatty dropped out of the project. The most that could be said from all of this is that cultural heritage was not the motive behind Britain's non-participation in the scheme.

E. *Appraisal*

Although the Ilisu Dam was similar in many respects to the Aswan High Dam, international actors responded very differently to it. From the Aswan case, it is reasonable to surmise that destroying Hasankeyf would have been permissible if Turkey had shown a clear economic need. However, here, the need was not expressed as one for physical survival but for physical improvement. Turkey needed electricity to improve the people's standard of

458. *Greens Hail Balfour Beatty's Ilisu Dam Pullout*, MORNING STAR, Nov. 14, 2001, at F3. (Friends of the Earth director stated: "However, the government has managed to avoid ever taking a clear decision on this scheme. That means that companies seeking future export credits can argue that no clear ethical precedent has been set."); *Swedish Firm Pulls out of Turkish Dam Project*, *supra* note 343.

459. Friends of the Earth, *Dammed if We Do, Green if We Don't*, <http://www.ilisu.org.uk> (last visited Nov. 2, 2002); Nicholson, *supra* note 324. Select committees of the Commons examined the dam issue four times and recommended that Britain withdraw from it each time. Brown, *supra* note 390.

460. Kamal Ahmed, *Turkish Dam to Lose UK Support: Report Raises Human Rights Concerns*, OBSERVER, July 1, 2001, at A4.

461. *The Biggest Corruption Scandal of All: While All Eyes Were on Hamilton, They Slipped the Dam Story Out*, GUARDIAN, Dec. 23, 1999, at A23.

462. De Sarkar, *supra* note 390; Alfred Lee, *London Under Fire for Backing Dam in Turkey*, STRAITS TIMES (Singapore), July 14, 2000, at A3.

463. De Sarkar, *supra* note 390.

464. Brown, *supra* note 390, at 10.

living. Even though this type of development was not “necessary” in the strictest sense of the word, global participants deferred to Turkey on this point. No one was willing to argue that Turkey did not have a right to improve the welfare of its people. Thus it appears that development for modernization purposes was also an acceptable reason to destroy cultural heritage.

Nevertheless, this case shows that economic development was not a blank check for destroying cultural property. International actors placed limits on Turkey by demanding that it mitigate the damage to Hasankeyf.⁴⁶⁵ These demands were significant because it meant that cultural heritage was now considered a distinct cost of development. In the Romanian case, cultural property was still evolving into an independent basis for protest and intervention, whereas here, it was consistently mentioned by almost all who opposed the dam. Furthermore, the pressure to mitigate also implies that states might have a duty to explore less destructive alternatives. Modifying or completely changing the plan might automatically mitigate the impact on relics.

Despite this, we cannot conclude from this case that an actual norm has formed. We cannot say that host states *must* mitigate the damage to relics or that they *must* explore alternatives because cultural heritage was not the only issue here. Social, political, and environmental matters were also involved, and it is difficult to tell which one of them was controlling. Yet decision-makers contemplating the destruction of heritage would be well-advised to fulfill these two conditions. Cultural property has steadily grown in importance over the years, and it is not unimaginable that people would one day come to expect this behavior.

The following case serves as a better gauge of world expectations because it provoked what may have been the strongest international response to cultural heritage destruction.

V. CASE 4: THE TALIBAN AND ITS THREAT TO THE BAMIYAN BUDDHAS (2001).

A. Introduction

This Article discusses the Taliban’s destruction of monumental Buddha statues in Afghanistan as the final case study because it provides strong evidence of an international norm in favor of cultural heritage preservation generally, and against iconoclasm specifically. In each of the last three cases, we saw how cultural heritage has assumed increasingly greater significance in international affairs. However, it remains difficult to determine how much importance cultural heritage has played because economic policy and other issues were also vital in the resolution of the given situations. By contrast, the world’s reaction to the Taliban’s deed was remarkable because cultural heritage was *the* issue about which global participants were concerned. As we shall see, such a strong response from outside parties most likely occurred

465. As Great Britain put it, Turkey had to save “as much as possible” of Hasankeyf. Justin Huggler, *British Builder Gets Go-Ahead for £200m Turkish Dam*, INDEPENDENT, Dec. 22, 1999, at A23.

because international actors determined the destruction lacked any justification, economic or otherwise. Therefore, the demolition of the Buddhas appeared to be an act of total extremism, which the world public order could not and would not tolerate.

B. *Facts*

1. *Context*

The Taliban was a militant Islamic group that was the *de facto* government of Afghanistan from 1996 to 2001.⁴⁶⁶ The group's rise to power was surprising because it captured such a large area of the country in so short a time. Afghanistan had been in a perpetual state of warfare since the Soviet Union invaded in 1979, but *mujahedin* warriors expelled the Soviets from Afghan territory in 1990, creating a power vacuum within the country. The different factions were supposed to share power in the Afghan Interim Government (AIG) for two years, after which, they were to have held democratic elections. However, the arrangement quickly fell apart because the leaders were deeply suspicious of one another. The only thing they had held in common was a shared enemy, and once it was gone, they were left to their individual aspirations. Instead of peace, Afghanistan saw more war. The rival *mujahedin* engaged in blocking roads, looting, corruption, theft, rape, and murder in their attempts to consolidate power. In response to the lawlessness, a group of religious scholars, known as the *taliban*, organized a resistance to the *mujahedin* in 1994. They quickly gained popularity because they promised to bring the peace and stability of a pure Islamic state.⁴⁶⁷ The Taliban message was effective because religion was one of the few common denominators among the ethnically-diverse Afghans.⁴⁶⁸ Within two years, the group had taken control of Kabul and the southern portion of the country, declaring Afghanistan to be a "completely Islamic state." Although the Taliban had not captured the entire country, it had captured enough to have effective control.

At first, the United States saw this victory as positive because the Taliban was anti-Iranian, anti-Russian, and because peace meant the possible exploitation of oil resources in the Central Asian Republics (CARs).⁴⁶⁹ Afghanistan had figured prominently in regional political calculations because the landlocked CARs wanted to build gas pipelines south, away from Russian control.⁴⁷⁰ Afghanistan would have been the perfect pipeline crossing point, but for the civil war.⁴⁷¹ Therefore, the United States, Pakistan, Turkey, and

466. For a thorough account of the Taliban's rise to power in Afghanistan, see generally AFGHANISTAN: A COUNTRY STUDY (Richard F. Nyrop & Donald M. Seekins eds., 1986); MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN (2001); PETER MARSDEN, THE TALIBAN: WAR AND RELIGION IN AFGHANISTAN (1998); AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL & FUNDAMENTALISM IN CENTRAL ASIA (2000).

467. GRIFFIN, *supra* note 466, at 6 (discussing the new restrictions on women); RASHID, *supra* note 466, at 70 (noting that public punishment became a weekly event).

468. Laurie Krieger, *Chapter 2: Society and Its Environment*, in AFGHANISTAN, *supra* note 466, at 87 ("One of the few commonalities in this diverse country is Islam.").

469. RASHID, *supra* note 466, at 176.

470. *Id.* at 144.

471. *Id.* at 155.

Saudi Arabia favored a Taliban peace, while Russia and Iran favored *mujahedin* war.⁴⁷² When the Taliban seized Kabul in 1996, it seemed like the end of Afghanistan's problems. However, it was only another beginning. Before long, Afghanistan became an international pariah because of the Taliban's harboring of terrorists, discriminatory treatment of women, and other radical policies. Afghanistan was not alone in segregating the sexes, but the Taliban took it to an unheard-of extreme. Among other things, the Taliban imposed strict requirements on dress, banned women from working or going to school, and meted out harsh punishments for slight infractions of the law.⁴⁷³ Punishments included public lashings, amputations, stonings, and executions of women for offenses as minor as failing to wear a skin-covering *burkha* or veil.⁴⁷⁴ These policies provoked immediate criticism from the United Nations, European Union, United States, and others, but the Taliban ignored all calls for moderation. Because of the Taliban's extreme conservatism, only Pakistan, Saudi Arabia, and the United Arab Emirates (U.A.E.) recognized it as the official government of Afghanistan.⁴⁷⁵ The rest of the world recognized the government-in-exile of Burhanuddin Rabbani, one of the original *mujahedin* leaders.

However, the Taliban refused to bow to outside pressure because it believed in its interpretation of *shari'ah* law. *Shari'ah* is a system of religious law derived from the Koran and the teachings of the prophet Mohammad.⁴⁷⁶ In Afghanistan, religious teachers, known as *mullahs*, interpret the law so that the community can follow the tenets of Islam.⁴⁷⁷ It was one such interpretation of *shari'ah* that sparked the following incident.

2. Threat

On February 26, 2001, the Taliban's Supreme Ruler, Mullah Mohammad Omar, issued a decree ordering the destruction of all statues in Afghanistan.⁴⁷⁸ According to official pronouncements, the statues had to be destroyed in order to prevent people from worshipping them as "false idols."⁴⁷⁹ The Taliban claimed that it had no choice in the matter because the decision was based on a *fatwah* (interpretation of Islamic law) handed down by Afghan clerics.⁴⁸⁰ In Islam, the depiction of living things in art is

472. *Id.* at 163 (noting the massive regional polarization).

473. GRIFFIN, *supra* note 466, at 6 (discussing the new restrictions on women); RASHID, *supra* note 466, at 70 (noting that public punishment became a weekly event).

474. RASHID, *supra* note 466, at 70.

475. Afghanistan was also not represented at the United Nations or the Organization of the Islamic Conference, a consortium of 55 Islamic states. Mohammad Bashir, *Afghan Taliban Begin Destruction of Ancient Buddha Statues*, AGENCE FRANCE-PRESSE, Mar. 1, 2001, <http://www.afp-direct.com/abonnes>.

476. Krieger, *supra* note 468, at 95.

477. *Id.* at 100.

478. Agence France-Presse, *Pre-Islam Idols Being Broken Under Decree by Afghans*, N.Y. TIMES, Mar. 2, 2001, at A9.

479. Molly Moore, *Afghanistan's Antiquities Under Assault*, WASH. POST, Mar. 2, 2001, at A1 (According to Omar, "These statues are there to be worshipped, and that is wrong. They should be destroyed so that they are not worshipped now or in the future.").

480. Stanislav Bychkov, *Taleban Decision to Ruin Buddha Statues is Irreversible-View*, ITAR-TASS, Mar. 3, 2001, LEXIS, Nexis Library, News Group File.

considered an affront to Allah, which is why human forms never appear in Islamic art.⁴⁸¹ Although the order applied to all statues, it was the destruction of two statues in particular that captured the world's attention.

When the Taliban announced its order, people immediately became anxious about the fate of the Bamiyan Buddhas, rare examples of monumental Buddhist sculpture.⁴⁸² The two statues commanded special attention because of their massive size and their religious, historic, and artistic significance. The twin figures were 165 feet and 114 feet tall respectively,⁴⁸³ and they were carved into the Bamiyan cliffs around the fifth century when Afghanistan was a center of Buddhism.⁴⁸⁴ Until the eleventh century, Bamiyan was also home to a large monastery, and Buddhist monks lived in the caves surrounding the statues.⁴⁸⁵ Thus, the site became an important pilgrimage destination for Buddhists, and monks traveled great distances to visit the site. In addition to their religious importance, the Buddhas symbolized the country's rich commercial history as well. Bamiyan had once been an important juncture along the famous Silk Route because of its central location between Europe and Asia.⁴⁸⁶ It also served as a convenient resting place for traveling caravans, and this led to the exchange of ideas and the blending of artistic styles across cultures. The Bamiyan Buddhas were artistically interesting because they presented a unique blend of Central Asian, Indian, and Hellenistic influences.⁴⁸⁷ For example, the Eastern statues wore Greek-style robes. Given these factors, it is not surprising that the world protested the Taliban's decree.

3. Reaction

The Taliban's announcement triggered an immediate and harsh response. International actors uniformly opposed the destruction and pled with the Taliban to reverse its course. Protesting states included: Afghanistan,⁴⁸⁸ Andorra, Argentina,⁴⁸⁹ Armenia, Australia,⁴⁹⁰ Austria,⁴⁹¹ Azerbaijan, Belgium, Benin, Bhutan, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Burma (Myanmar), Cambodia (Kampuchea), Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador,

481. Krieger, *supra* note 468, at 89 (For Muslims, "God exists on a plane of power and sanctity above any other being and to associate anything with him in any visual symbol is a sin.").

482. Holland Cotter, *Buddhas of Bamiyan: Keys to the Asian History*, N.Y. TIMES, Mar. 3, 2001, at A22.

483. Dave Clark, *UNESCO Chief Sends Envoy to Try and Halt Toppling of Afghan Statues*, AGENCE FRANCE-PRESSE, Mar. 2, 2001, LEXIS, Nexis Library, News Group File.

484. Jet van Krieken, *The Buddhas of Bamiyan: Challenged Witnesses of Afghanistan's Forgotten Past*, International Institute for Asian Studies, <http://www.purabudaya.com/resources/bamiyan/bamiyan.htm> (last visited Dec. 5, 2002).

485. RASHID, *supra* note 466, at 68.

486. *Id.*

487. *Id.*; Cotter, *supra* note 482.

488. The Afghan government recognized by most states and by the United Nations was the government-in-exile of Burhannudin Rabbani, the Islamic State of Afghanistan. So even though the Taliban was the de facto government of Afghanistan, Afghanistan's official position was condemnation of the Taliban decree.

489. Edgar C. Cadano, *Destruction of Buddha Statues an Internal Matter, Says Afghan Envoy*, SAUDI GAZETTE, Apr. 2, 2001, LEXIS, Nexis Library, News Group File.

490. *Id.*

491. *Id.*

Egypt,⁴⁹² El Salvador, Estonia, Fiji, Finland, France,⁴⁹³ Georgia, Germany,⁴⁹⁴ Greece, Guatemala,⁴⁹⁵ Haiti, Hungary, Iceland, India,⁴⁹⁶ Iran,⁴⁹⁷ Ireland, Israel, Italy,⁴⁹⁸ Japan,⁴⁹⁹ Jordan,⁵⁰⁰ Kazakhstan, Korea (Republic of),⁵⁰¹ Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Malaysia,⁵⁰² Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Nepal,⁵⁰³ Netherlands,⁵⁰⁴ New Zealand,⁵⁰⁵ Nicaragua, Norway, Panama, Pakistan,⁵⁰⁶ Paraguay, Peru, Poland, Portugal, Qatar,⁵⁰⁷ Romania, Russia,⁵⁰⁸ Saudi Arabia,⁵⁰⁹ Samoa, San Marino, Sierra Leone, Slovakia,

492. Egyptian President Hosni Mubarak sent the "Mufti of the Republic, the country's most senior Islamic authority to meet with Taleban leaders." *CNN Tonight: Egyptian Leaders Appeal to Taleban to Save Afghanistan's Ancient Heritage* (CNN television broadcast, Mar. 11, 2001), LEXIS, Nexis Library, News Group File.

493. French Foreign Ministry Spokesperson Bernard Valero said, "It is not with such behaviour that the Taliban will be able to come closer to the international community." Stephen Coates, *Afghan Taliban Slip Deeper into International Wilderness*, AGENCE FRANCE-PRESSE, Mar. 2, 2001, LEXIS, Nexis Library, News Group File.

494. Germany sponsored the U.N. Resolution condemning the destruction of the Buddha statues. U.N.G.A., 94th Plenary Meeting, 55th Sess., U.N. Doc. No. A/55/PV.94 (2001). *See also* Mohammad Bashir, *Worldwide Horror as Afghan Taliban Begin Smashing Ancient Statues*, AGENCE FRANCE-PRESSE, Mar. 2, 2001, LEXIS, Nexis Library, News Group File.

495. At the U.N. meeting, Mr. Esteves-Lopez of Guatemala expressed that his "government feels deep and special concern over the situation that the draft resolution before us, of which we have the honour of being one of the sponsors, seeks to correct, or at least attenuate." U.N.G.A., 94th Plenary Meeting, 55th Sess., Doc. No. A/55/PV.94 (2001), LEXIS, Nexis Library, News Group File.

496. Prime Minister Atal Behari Vajpayee remarked, "Terrorism and an ambiguous ideology have unfortunately taken hold in our region and led to the tragedy of the destruction of the historic heritage of mankind . . ." Modher Amin, *India Denounces Taliban*, UNITED PRESS INT'L, Apr. 11, 2001, LEXIS, Nexis Library, News Group File.

497. The Iranian Majlis (Parliament) issued a statement saying that "those who pretend to be paragons of Islam . . . are seen committing such evil acts." The "cultural committee calls on all international bodies to spare no effort in calling a halt to such anti-Islamic and counter-cultural acts aimed at portraying a wrong image of Islam." *Iran: Majlis Condemns Taleban Destruction of Statues*, BBC WORLDWIDE MONITORING, Mar. 5, 2001, LEXIS, Nexis Library, News Group File.

498. Italian Ambassador to Pakistan, Angelo Gabriele de Ceglie responded, "The absolutely stupid decision to destroy the statues is only a symptom of a very, very general malaise. It is a country where nothing is going the way it should go." Scott Baldauf, *Taliban Carries Out Pledge to Demolish Non-Islamic Sites*, CHRISTIAN SCI. MONITOR, Mar. 5, 2001, at A7.

499. Japan threatened to reduce its aid to Afghanistan if the statues were destroyed. Thalif Deen, *Taliban's Destruction of Statues May Jeopardize Aid*, INTER PRESS-SERVICE, Mar. 12, 2001, LEXIS, Nexis Library, News Group File.

500. Jordanian Cultural Minister Mahmud Kayed expressed disappointment over the destruction. "We in Jordan have followed with much astonishment and reprobation the determination of the Taliban government to destroyed [sic] the historic statues in Afghanistan . . . We express our disappointment over the failure of Arab, Islamic and international efforts to stop these attacks on a humanitarian heritage." *Jordan Disappointment over Buddhas Destruction Despite World Efforts*, AGENCE FRANCE-PRESSE, Mar. 12, 2001, LEXIS, Nexis Library, News Group File.

501. Cadano, *supra* note 489.

502. *KL Joins Calls to Keep Pre-Islamic Bamiyan Buddha Statues*, STAR, Mar. 6, 2001, <http://www.ukmba.org.my>.

503. Ahmed Rashid, *Taliban Tanks and Artillery Fire on Buddhas*, DAILY TELEGRAPH, Mar. 3, 2001, at A1.

504. Cadano, *supra* note 489.

505. *Id.*

506. The Pakistani Foreign Minister Abdul Sattar confirmed that "Pakistan joins all other nations in appealing to the Taleban government to reconsider and rescind the reported decision regarding the statues of Lord Buddha." *Pakistan Foreign Minister Asks Taleban to Review Decision Destroying Buddha*, BUS. RECORDER, Mar. 4, 2001, LEXIS, Nexis Library, News Group File.

507. The Foreign Ministry stated that Buddhist monuments "belong to the whole of mankind and they should be preserved" wherever they are located. Bychkov, *supra* note 480.

508. The Russian Foreign Minister called on the Taliban to stop the acts of "vandalism" and

Slovenia, Spain, Solomon Islands, South Africa,⁵¹⁰ Sri Lanka,⁵¹¹ Sweden, Switzerland,⁵¹² Suriname, Tajikistan,⁵¹³ Thailand,⁵¹⁴ Togo, Turkey, Ukraine, United Arab Emirates,⁵¹⁵ United Kingdom, United States,⁵¹⁶ Uruguay, Uzbekistan, Vietnam, and Yugoslavia.⁵¹⁷ Kofi Annan⁵¹⁸ and the Dalai Lama⁵¹⁹ protested individually, while international organizations joined the cry. On March 9, 2001, the U.N. General Assembly adopted a resolution calling for the Taliban's "immediate action to prevent the further destruction of the irreplaceable relics, monuments or artifacts of the cultural heritage of Afghanistan."⁵²⁰ The United Nations' position was greatly enhanced when its twenty-two-member Arab Group confirmed the savagery of the act, noting that successive Islamic governments had preserved the statues for over fourteen centuries.⁵²¹ In addition, other groups who objected were UNESCO,⁵²² the Organization of the Islamic Conference (OIC),⁵²³ the European Union (E.U.),⁵²⁴ the Council of Europe,⁵²⁵ and the G-8 group.⁵²⁶

added that "[t]hese intentions [to destroy the statues] cannot be regarded in any other way than encroachment on the cultural heritage of not only the Afghan people, but the world civilization." Yuri Ulyanovsky, *UNESCO Director Criticizes Buddhist Statue Destruction*, ITAR-TASS, Mar. 1, 2001, LEXIS, Nexis Library, News Group File.

509. *Saudi's Fahd, Pakistan's Musharraf Discuss Islamic, International Scene*, AGENCE FRANCE-PRESSE, Mar. 2, 2001, LEXIS, Nexis Library, News Group File.

510. Ronnie Mamoepe, Foreign Affairs spokesperson for South Africa, said, "We call on the Taliban government to desist from actions which would lead to untold misery and loss of innocent lives among Afghans and explore methods for peaceful resolution of the conflict." *Government Concerned About Destruction of Buddhist Statues by Taliban*, S. AFR. PRESS ASS'N, Mar. 15, 2001, at A10.

511. President Chandrika Kumaratunga said that her government would be willing to finance an international drive to save the statues in Bamiyan. *Sri Lankan PM in Pakistan for Talks on Afghan Statues Destruction*, AGENCE FRANCE-PRESSE, Mar. 13, 2001, LEXIS, Nexis Library, News Group File.

512. Cadano, *supra* note 489.

513. *UNESCO Condemns Destruction of Afghan Monuments, Summons OIC Members*, AGENCE FRANCE-PRESSE, Mar. 1, 2001, LEXIS, Nexis Library, News Group File.

514. Thailand also sponsored G.A. Draft Res. A/55/L.79. U.N. GAOR, 94th Mtg., 55th Sess., U.N. Doc. A/55/PV.94 (2001) [hereinafter G.A. Draft Res.]. Thai Charge d'Affaires, Somsakdi Suriyawongse, said his embassy in Iran, along with fifteen other diplomatic missions, condemned the actions. Cadano, *supra* note 489.

515. *Saudi's Fahd, Pakistan's Musharraf Discuss Islamic, International Scene*, *supra* note 509.

516. Bashir, *supra* note 475.

517. Rashid, *supra* note 503. The states listed, *supra*, in the text accompanying notes 488-517 sponsored *The Destruction of Relics and Monuments in Afghanistan*, G.A. Res. 55/234, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/243 (2001), calling upon the Taliban to stop the implementation of its edict.

518. Bashir, *supra* note 475.

519. Alex Spillius, *Taliban Ignore Appeals to Save the Buddhas*, DAILY TELEGRAPH, Mar. 5, 2001, at A12 ("I am deeply concerned about the possible destruction of the Bamiyan statues of the Buddha at a time when there is a closer understanding and better harmony among different religions of the world.").

520. *The Destruction of Relics and Monuments in Afghanistan*, G.A. Res. 55/234, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/243 (2001).

521. Sami Zubeiri, *UNESCO Envoy Starts Mission to Save Afghan Heritage*, AGENCE FRANCE-PRESSE, Mar. 3, 2001, LEXIS, Nexis Library, News Group File.

522. *UNESCO Condemns Destruction of Afghan Monuments, Summons OIC Members*, *supra* note 513.

523. Mohammad Bashir, *Bamiyan Buddha Destruction Continues Unabated: Taliban*, AGENCE FRANCE-PRESSE, Mar. 11, 2001, LEXIS, Nexis Library, News Group File.

524. The President of the E.U. Commission stated, "It is with dismay and shock that the E.U. has received information about the edict of the Taliban leader Mulla Omar, in which the destruction of all statues and shrines in Afghanistan is ordered." Bashir, *supra* note 494.

525. Council of Europe Secretary General Walter Schwimmer protested, "No political or religious power has the right to deliberately destroy cultural property that belongs to humankind."

UNESCO received more than a thousand e-mail messages a day supporting its efforts to stop the destruction.⁵²⁷ In short, the numbers show that concern for cultural heritage was not limited to a particular group or region, but that it extended across geographical, cultural, and political boundaries.

In addition to direct appeals, some actors responded by asking Muslim states to influence the Taliban. For instance, parties approached Pakistan because it was one of the few countries to have recognized the Taliban.⁵²⁸ Pakistan pledged to help and asked the Taliban to repeal the decision twice.⁵²⁹ When Saudi Arabia, Iran, and Tajikistan were contacted, they too agreed to do what they could.⁵³⁰

Some actors actually flew to Afghanistan to plead the case in person. UNESCO, the OIC and Pakistan all sent delegations, but they were equally unsuccessful.⁵³¹ Of all the missions, the OIC looked the most promising because the Taliban had said that it might be possible to retract the decree if religious scholars found the destruction to be improper.⁵³² In response, the OIC sent its most prominent Muslim clerics who informed the Taliban that its interpretation of Islam was wrong.⁵³³ The statues were not idols but mere "historical legacies," which did not affect Islam negatively.⁵³⁴ However, the Taliban disregarded such advice and proclaimed the edict to be irreversible.⁵³⁵ In any case, the Taliban's prior statement had little value considering that they had already destroyed ninety percent of the Buddha statues by the time the parties had arrived.⁵³⁶ The delegations had suspected that was the case, but

Zubeiri, *supra* note 521.

526. Spillius, *supra* note 519.

527. UNESCO, *World Heritage Newsletter* No. 30, July 30, 2001, <http://www.unesco.org/whc/news/3001.htm>.

528. *UNESCO Condemns Destruction of Afghan Monuments, Summons OIC Members*, *supra* note 513 (noting that UNESCO chief contacted Pakistan, Saudi Arabia, Iran, and Tajikistan to intervene); *Sri Lanka Moves to Save Bamiyan Buddhas from Taliban*, AGENCE FRANCE-PRESSE, Feb. 28, 2001, LEXIS, Nexis Library, News Group File.

529. *Pakistan Chief Executive Urges Taleban Not to Demolish Statues*, BUS. RECORDER, Mar. 9, 2001, LEXIS, Nexis Library, News Group File; *Pakistan Foreign Minister Asks Taleban to Review Decision Destroying Buddha*, *supra* note 506.

530. *Sri Lanka Moves to Save Bamiyan Buddhas from Taliban*, *supra* note 528.

531. Bashir, *supra* note 523; *Pakistani Minister Fails to Save Afghan Statues*, AGENCE FRANCE-PRESSE, Mar. 10, 2001, LEXIS, Nexis Library, News Group File; Clark, *supra* note 483.

532. Ibtisam Awadat, *Jordanian Islamists Divided over Buddha Statues*, STAR, Mar. 18, 2001, LEXIS, Nexis Library, News Group File; Sun Hao, *Further Efforts on Road to Save Ancient Statues from Destruction*, XINHUA NEWS AGENCY, Mar. 13, 2001, LEXIS, Nexis Library, News Group File.

533. The OIC delegation included Mufti Sheikh Nasr Farid Wassel, the highest religious authority in Egypt, Sheikh Yusef al-Qaradawi and Mohamed al-Rawi, both Sunni clerics, Ahmed bin Abdullah al-Mahmud, Qatar's Minister of State for Foreign Affairs, and Ibrahim Bakr, an OIC official. Bashir, *supra* note 523.

534. Al Sharq-al Awsat, *Egypt's Mufti Wasil Interviewed on Recent Visit to Afghanistan*, BBC SUMMARY WORLD BROADCASTS, Mar. 23, 2001, LEXIS, Nexis Library, News Group File; *Egyptian Clerics to Dissuade Taliban from Destroying Buddha Statues*, XINHUA NEWS AGENCY, Mar. 10, 2001, LEXIS, Nexis Library, News Group File; *Top Sunni Muslim Leaders Head to Afghanistan to Save Buddhas*, AGENCE FRANCE-PRESSE, Mar. 10, 2001, LEXIS, Nexis Library, News Group File.

535. A Taliban spokesperson said, "They wanted us to stop the destruction but failed to convince us that destroying statues is un-Islamic." *Islamic Clerics Return Empty-Handed from Afghanistan: Report*, AGENCE FRANCE-PRESSE, Mar. 12, 2001, LEXIS, Nexis Library, News Group File.

536. Barry Bearak, *Afghan Says Destruction of Buddhas Is Complete*, N.Y. TIMES, Mar. 12, 2001, at A4.

they went because the destruction was still unconfirmed, and they hoped that the Taliban had just been bluffing.⁵³⁷

A few actors tried a different approach, offering to buy the statues instead. The Metropolitan Museum of Art,⁵³⁸ an Iranian-born art collector,⁵³⁹ Iran,⁵⁴⁰ and Sri Lanka⁵⁴¹ were among those who made offers to buy and remove the statues from Afghanistan. Sri Lanka went the furthest by offering to buy the remains of the demolished statues because it hoped to rebuild the Buddhas if they were destroyed.⁵⁴² The Taliban ignored other offers but explicitly rejected the offer from Iran. Afghan Foreign Minister, Wakil Ahmad Mutawakel replied that "[t]he transportation of Buddha statues from Afghanistan to Iran might make it appear that there is no place for them in Afghanistan, but that is not so. . . . Afghanistan and Iran are two Islamic countries, and Islam says one Muslim should not give to another Muslim what he does not want to have."⁵⁴³

4. Outcome

Despite all these efforts, the Taliban ultimately followed through on its threat and demolished the Bamiyan Buddhas. By all accounts, the group viewed it as a victory and cause for celebration. Mullah Omar had fifty cows slaughtered at the site and flew in Taliban dignitaries for the event. He also ordered a hundred more cows to be killed to atone for the delay and to distribute the meat to the poor. However, the mood outside of Afghanistan was not so festive. France invited Ahmed Shah Massoud, a *mujahedin* leader, to Paris for official talks.⁵⁴⁴ Various museums prepared special exhibitions to remember Afghan art. In addition, UNESCO began drafting the Declaration Against the Intentional Destruction of Cultural Heritage.⁵⁴⁵ In an uncharacteristic move, the Taliban sent an official to the United States to explain its position on the statues.⁵⁴⁶

537. *Id.*

538. *U.N. Pleads with Taliban Not to Destroy Buddha Statues*, N.Y. TIMES, Mar. 3, 2001, at A3.

539. Houshang Mahboubian offered 3.4 million pounds for the largest Buddha. He was also ready to buy all the pieces the government wanted to destroy, which he estimated would cost sixty-eight million pounds. Zahid Hussain & Stephen Farrell, *Taleban Smashes Statues of "Infidel" Buddha*, TIMES (London), Mar. 5, 2001, at 4M.

540. Spillius, *supra* note 519.

541. President Chandrika Kumaratunga said her government would be willing to finance an international drive to save the statues in Bamiyan. Amazingly, this was a position the opposition party actually supported. *Sri Lankan PM in Pakistan for Talks on Afghan Statues Destruction*, *supra* note 511.

542. *Sri Lanka Bids to Rebuild Bamiyan Buddha Statues from Rubble*, AGENCE FRANCE-PRESSE, Mar. 18, 2001, LEXIS, Nexis Library, News Group File.

543. *Taleban Reject Iran's Offer to Buy Statues*, BBC SUMMARY OF WORLD BROADCASTS, Mar. 6, 2001, LEXIS, Nexis Library, News Group File.

544. *Afghan Opposition Leader Invited to Paris by European Parliament*, AGENCE FRANCE-PRESSE, Mar. 31, 2001, LEXIS, Nexis Library, News Group File.

545. Press Release, UNESCO, UNESCO: Cultural Diversity and Heritage Preservation at the Heart of Mutual Understanding (Nov. 3, 2001) http://www.unesco.org/confgen/press_rel/031101_final.shtml.

546. Frederick M. Winship, *Art World: Endangered Cultural Treasures*, UNITED PRESS INT'L, Mar. 29, 2001, LEXIS, Nexis Library, News Group File.

A new interim government headed by Hamid Karzai came to power in 2001 following the American-led war against the Taliban. The new Afghan government has requested help from UNESCO to rebuild the Buddha statues and to protect the country's remaining heritage.⁵⁴⁷ International experts oppose the reconstruction, however, because they believe the new statues would be inauthentic.⁵⁴⁸ Nonetheless, UNESCO has planned a mission to assess the present state of conservation there and has opened a special bank account for preserving Afghan relics.⁵⁴⁹ Greece, Italy, the United Nations, and private groups have already made pledges.⁵⁵⁰ Meanwhile, the Society for the Preservation of Afghanistan's Cultural Heritage has been organizing salvage operations for Kabul Museum's remaining collections.⁵⁵¹ Finally, UNESCO is trying to prevent another incident like the present one by organizing a meeting with Qatar's Faculty of Law, the Islamic Educational, Scientific and Cultural Organization (ISESCO), and the Arab League Educational, Scientific and Cultural Organization (ALESCO). They hope to discuss the interpretation of Islamic law and its relationship to cultural heritage.⁵⁵²

C. *Analysis of Claims*

1. *The Taliban's Claims*

As to why this incident occurred, the Taliban made two claims regarding the necessity of its destructive act: (1) that the statues had to be destroyed because *shari'ah* law prohibited idol worship; and (2) that the international community provoked the Taliban because it would only provide aid for the protection of art, but not to help the people. Mullah Muhammad Omar declared that "[t]he breaking of statues is an Islamic order and . . . Islamic law is the only law acceptable to me."⁵⁵³ According to officials, the threat of idol worship was real because visitors had been known to pray before such statues before,⁵⁵⁴ and this was seen as unacceptable in an Islamic state. In addition, the Taliban contended that a UNESCO envoy triggered the destruction when he came to offer funds for heritage preservation. The Muslim clerics became angry because the envoy refused their requests to apply the money towards humanitarian aid.⁵⁵⁵ The Afghan people were facing famine because of

547. Press Release, UNESCO, Hamid Karzai Maps Progress Achieved and Work Ahead for the Reconstruction of Afghanistan (Mar. 2, 2002), http://www.unesco.org:83/ev.php?URL_ID=27788&URL_DO=DO_TOPIC&URL_SECTION.

548. Celestine Bohlen, *Cultural Salvage in Wake of Afghan War*, N.Y. TIMES, Apr. 15, 2002, at E1.

549. UNESCO, *supra* note 527.

550. Bohlen, *supra* note 548.

551. Norman Hammond, *Fight to Preserve Afghanistan's Cultural Heritage*, TIMES (London), Nov. 2, 2001.

552. UNESCO, *Report on the Convention Concerning the Protection of the World Cultural and Natural Heritage*, World Heritage Com., 25th Sess., U.N. Doc. WHC-01/CONF.208/24 (2002).

553. Marwaan Macan-Markar, *Taliban Brand of Islam Faces Stern Test*, INTER-PRESS SERVICE, Sept. 18, 2001, LEXIS, Nexis Library, News Group File.

554. The Taliban began cracking down on Buddhist art in the fall of 2000 after a foreigner visiting the Kabul Museum made a gesture before a Buddha that was mistaken for prayer. Carla Power & Michelle Chan, *Saving the Antiquities*, NEWSWEEK, May 14, 2001, at 54.

555. The Taliban envoy who visited the United States stated, "They rejected that, saying 'This money is only for statues.' But when your children are dying in front of you, you don't care about a

drought and economic sanctions.⁵⁵⁶ The fact that no one would help left the Taliban with the impression that the world cared more about rocks than about living people.

Nonetheless, the evidence disproves the first assertion. Even though *shari'ah* law is subject to continuous debate and interpretation, there is persuasive authority that *shari'ah* does not require the destruction of all statues. Egypt's foremost cleric, Mufti Wasil, clarified that while *shari'ah* mandated the destruction of statues worshipped instead of God, this did not apply to historical artifacts not affecting Islam.⁵⁵⁷ In fact, it was the duty of Islamic countries to preserve monuments for humankind because Islam respected the heritage and religious beliefs of others.⁵⁵⁸ Sheikh Youseff El-Qaradawi added that *shari'ah* incorporated a commitment not to destroy pre-Islamic monuments in the lands Muslims had conquered.⁵⁵⁹ This was borne out by history because before the Taliban, the Bamiyan Buddhas had only been attacked twice during their long history.⁵⁶⁰ In fact, previous Afghan governments had tried to have the Buddhas inscribed as a UNESCO World Heritage Site,⁵⁶¹ but the ongoing civil war had made this administratively impossible.⁵⁶² Furthermore, other Muslim countries such as Egypt had preserved other pre-Islamic works throughout their history.⁵⁶³ Wasil believed that the Taliban had erred because Afghan clerics did not know the Arabic language, linguistics, and literature necessary to interpret the *shari'ah* properly.⁵⁶⁴ While *mullahs* are supposed to be knowledgeable in the tenets of Islam, Afghan *mullahs* might have only been slightly more educated than the Muslims they served because the Taliban was isolated from the Islamic as well as the Western world.⁵⁶⁵ Wasil's viewpoint should carry considerable weight because he is the top cleric from the highest authority on Sunni Islam,⁵⁶⁶ the branch of Islam practiced by most Afghans.⁵⁶⁷

The Taliban's own actions belie its claim that Islam required the destruction of non-Islamic works. In a glaring example, the Taliban allowed

piece of art." The scholars said, "If you are destroying our future with economic sanctions, you can't care about our heritage." Winship, *supra* note 546.

556. Coates, *supra* note 493.

557. Al-Sharq al-Awsat, *supra* note 534.

558. Manoj Joshi, *Clerics Fume at Taliban's Idea of Islam*, TIMES OF INDIA, Mar. 19, 2001, LEXIS, Nexis Library, News Group File.

559. *Id.*

560. Sally Ann Baynard, *Chapter 1: Historical Setting*, in AFGHANISTAN, *supra* note 466, at 11; Soren Melikian, *Taleban's Act Flies in the Face of Islam's Tenets*, INT'L HERALD TRIB., Mar. 7, 2001, at A1.

561. In 1982, the Democratic Republic of Afghanistan submitted nine nominations for inscriptions on the World Heritage List. Five of the applications were incomplete, including the application for the Bamiyan Buddhas. UNESCO, *supra* note 552.

562. Stephanie Cash, *Afghan Culture Remains in Peril*, ART AM., May 1, 2001, at 192; Aamir Shah, *Taliban Begin Demolishing Buddhas*, UNITED PRESS INT'L, Mar. 1, 2001.

563. *Top Sunni Muslim Leaders Head to Afghanistan to Save Buddhas*, *supra* note 534.

564. Al-Sharq al-Awsat, *supra* note 534.

565. Joshi, *supra* note 558.

566. Wasil is a cleric from Al Azhar University, which is seen as the "Vatican of Islam." Students from all over the world go to study Islam there, and religious opinions from Al Azhar are often sought after. C. Raja Mohan, *Taking to the Veil?*, HINDU, Mar. 20, 2001, <http://www.hinduonnet.com/thehindu/2001/03/20/stories/0520134c.htm>

567. U.S. Department of State, *Annual Report on International Religious Freedom for 1999: Afghanistan*, <http://www.usembassy.state.gov/afghanistan/www/hrf99.html>.

Hindus to continue worshipping in their statue-filled temples.⁵⁶⁸ It is illogical that the Taliban would destroy statues with the potential of being worshipped and not statues *actually* being worshipped. In addition, Mullah Omar had declared on previous occasions that the Taliban would protect the Buddha statues.⁵⁶⁹ In 1998, the group acted on this sentiment and tried to convince Mr. Bucherer-Dietschi, the director of the Swiss museum, Biblioteca Afghanistanica, to remove Afghan artifacts and to keep them in Switzerland until the fighting ceased.⁵⁷⁰ The Taliban had sent the Minister of Information and Culture, Qudratullah Jamal, and Omar's advisor, Jalil Ahmad.⁵⁷¹ Ironically, preservation was the one issue that the Taliban and its opponents, the Northern Alliance, had been able to agree upon.⁵⁷² Yet international organizations blocked the plan because they believed that it was best to maintain artifacts in their historical settings.⁵⁷³ The Taliban had still been pushing for removing threatened objects as recently as 2000.⁵⁷⁴ One could argue that before the *fatwah*, the Taliban believed it was religiously correct to preserve ancient statues. These factors combined with the outside interpretations of Islamic law show how incredible the Taliban's argument was.

Although the Taliban repeatedly claimed that the *fatwah* was an internal religious matter,⁵⁷⁵ the response of other Muslim states demonstrates the opposite. One reason they denounced the edict was because they did not want to exacerbate the world's negative image of Islam.⁵⁷⁶ When Egypt supported the U.N. Resolution against the Taliban decree, the Egyptian ambassador called on the Taliban to "refrain from taking any action that could cast a poor light on Islam."⁵⁷⁷ It was not just internal because this type of extremism impacted Muslims negatively everywhere. For instance, Hindus in India responded by burning the Koran.⁵⁷⁸

The Taliban's second claim, that it was provoked, similarly lacked credibility because of the Taliban's own recalcitrant behavior. It is true that

568. Winship, *supra* note 546.

569. Jean-Claude Chapon, *Taliban Destruction of Statues Fueled by Resentment over Isolation*, AGENCY FRANCE-PRESSE, Mar. 5, 2001, LEXIS, Nexis Library, News Group File.

570. Alex Blair, *Afghan Relics Find Sanctuary in Switzerland*, TIMES (London), May 12, 2001, at 5L; Barbara Crossette, *U.N., in Shift, Moves to Save Art for Afghans*, N.Y. TIMES, Mar. 31, 2001, at A1; Power & Chan, *supra* note 554.

571. Crossette, *supra* note 570. ("They stressed very much that it shouldn't be in an existing foreign museum, but an Afghan museum in exile. It was not my idea. It was not a Swiss idea. It was not a UNESCO idea. It was a pure Afghan idea," said Paul Bucherer, director of Biblioteca Afghanistanica.)

572. Power & Chan, *supra* note 554.

573. *Id.*

574. Crossette, *supra* note 570.

575. Referring to Pakistani Interior Minister Haider's visit with Mullah Omar, a Taliban spokesperson said, "After he told us of his government's concerns and proposals, we reaffirmed to him that this was an internal religious issue without any room for a delay in the decree's implementation." *Pakistani Minister Fails to Save Afghan Statues*, *supra* note 531.

576. Mufti Wasel, the Egyptian cleric feared that "[t]his could lead to great schisms between Muslims and non-Muslims. Buddhists and Hindus are now in an uproar against Muslims, and that is something we would like to avoid." *CNN Tonight: Egyptian Leaders Appeal to Taleban to Save Afghanistan's Ancient Heritage*, *supra* note 492.

577. G.A. Draft Res., *supra* note 514.

578. Mohammad Bashir, *Shiite Muslims Observe Mohorram Rituals in Afghanistan*, AGENCY FRANCE-PRESSE, Apr. 1, 2001, LEXIS, Nexis Library, News Group File.

states were not as forthcoming with humanitarian aid as they might have been.⁵⁷⁹ However, the destruction of the statues was not meant to be a statement about Afghanistan's need for aid. In reality, Muslim clerics had been debating whether to destroy the statues since before the end of the Afghan monarchy in 1973.⁵⁸⁰ The clerics already had an inclination to destroy the statues, and UNESCO's offer of preservation funds only provided a convenient excuse. The demolition had been carefully planned before the envoy arrived.⁵⁸¹ Non-Afghan workers were chosen to pillage the National Museum in Kabul because local Taliban leaders refused to do the job.⁵⁸² The Taliban evacuated the Hazaras from Bamiyan, and it hired Arab, Sudanese and Bangladeshi demolition experts to do the work.⁵⁸³ If the UNESCO offer had really been the cause, the Taliban would not have had such a plan in place or partially executed. What is more, the shortage of supplies cannot be solely attributed to the lack of international assistance because the Taliban was complicit in that shortage.⁵⁸⁴ For instance, in 1997, the Taliban blockaded the roads and refused to let the workers from the World Food Programme through even though one million Hazaras were starving.⁵⁸⁵ Moreover, when the U.N. was there, the Taliban behaved so violently that the U.N. had to withdraw its staff from Kandahar and stop aid operations.⁵⁸⁶ Twenty-two out of thirty relief NGOs voted to leave Kabul because the Taliban imposed impossible demands, such as requiring Muslim female aid workers to be accompanied by male relatives wherever they went.⁵⁸⁷ Thus, a huge problem was the distribution of aid, not just the lack of it. When the aid agencies left, all the Taliban had to say was, "We Muslims believe God the Almighty will feed everybody one way or another. If the foreign NGOs leave it is their decision. We have not expelled them."⁵⁸⁸ Thus, the lack of humanitarian assistance seems to be a weak justification for the destruction of the statues. Even so, the Taliban's claim had particular resonance because many would agree that human life is more important than physical objects.

2. Counterclaims

International actors widely believed that the Taliban was defying the world because it was frustrated by the constant condemnation. Before this incident, the Taliban had been making attempts to improve its image and relations with other states. The most important step it had taken was banning

579. The Taliban had requested \$67 million in drought relief and had received only \$8 million. NGOs were reluctant to give any aid because the Taliban refused to call a cease fire. RASHID, *supra* note 466, at 79.

580. Winship, *supra* note 546.

581. Bohlen, *supra* note 548.

582. *Id.*

583. Babk Dehghanpisheh, *Rebuilding the Bamiyan Buddhas*, NEWSWEEK, Dec. 31, 2001, at 23.

584. The Taliban harassed NGOs not working on projects preferred by the regime. U.S. Dept. of State, *Afghanistan: Country Reports on Human Rights Practices - 2000*, <http://www.state.gov/g/drl/rls/hrrpt/2000/sa/721.htm> (last visited Feb. 23, 2001).

585. RASHID, *supra* note 466, at 67.

586. *Id.* at 70.

587. *Id.* at 72.

588. *Id.*

the cultivation of poppies used to make heroine. Afghanistan had previously been heavily criticized for being the world's largest poppy producer and for deriving its major income from taxation of the activity.⁵⁸⁹ The U.N. Drug Control Program confirmed that within ten months the Taliban had virtually eliminated the opium industry in Afghanistan.⁵⁹⁰ Despite this, however, the United States included Afghanistan on its list of countries that were not cooperating in the drug war.⁵⁹¹ What made things even worse was that the United Nations ordered harsher sanctions against Afghanistan in January 2000. The U.S.-backed measure was a response to the Taliban's refusal to extradite Osama bin Laden, who the United States believed was behind the American embassy bombings in Kenya and Tanzania in 1998.⁵⁹²

There is some evidence that the Taliban was trying to defy the international community. Various remarks made by Taliban officials belie resentment. Qudratullah Jamal, the Minister of Information and Culture observed that "[a]t the insistence of the international community, the Taliban eradicated poppy-growing For their pains, they received sanction and a cut in international assistance."⁵⁹³ Jamal added that the Taliban would not retreat just because of the uproar because the world "was not kind" to the Afghan people.⁵⁹⁴ When challenged by sixteen diplomatic missions, Moley Abdulwahab, the Afghan chargé d'affaires, asked where they had all been when the leg and the head of the statues were destroyed during the civil war. Why had they not asked to repair the statues at that time, and where were they when the Indians destroyed the Babri mosque?⁵⁹⁵ The tone suggests that the Taliban viewed the protestors as self-righteous and hypocritical. Before the United Nations imposed new sanctions, the Taliban had kept Osama bin Laden hidden from view, but afterwards his visibility increased.⁵⁹⁶

Defiance relates to the assertion that the Taliban were driven by a desire for international recognition.⁵⁹⁷ Recognition is important to a state's survival because it makes a government effective both domestically and internationally. For example, it would have been easier to get humanitarian aid or economic assistance if other states viewed the Taliban as the country's legitimate government. Recognition might have also deterred opposition groups, like the *mujahedin* from trying to undermine them.⁵⁹⁸ In addition, the Taliban wanted recognition because major oil companies were unwilling to build a pipeline through Afghanistan while the situation remained unsettled.

589. Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES, Mar. 4, 2001, at A10.

590. Chapon, *supra* note 569.

591. *Id.*

592. Coates, *supra* note 493.

593. Chapon, *supra* note 569.

594. Mohammad Bashir, *Taliban Disregard Outcry, Begin Destroying Buddhist Statues*, AGENCE FRANCE-PRESSE, Mar. 3, 2001, LEXIS, Nexis Library, News Group File.

595. Cadano, *supra* note 489.

596. Hussain & Farrell, *supra* note 539.

597. Chapon, *supra* note 569.

598. An exasperated Taliban ambassador accused the U.N., by its non-recognition, of encouraging Rabbani and his allies to continue the war in Afghanistan. *U.N. Seat for Ousted Afghan Regime to Prolong War: Taliban*, XINHUA NEWS AGENCY, Nov. 4, 2000, LEXIS, Nexis Library, News Group File.

Therefore, non-recognition meant that the Taliban would not be able to capitalize on lucrative deals to exploit gas resources. Prior to this period, oil companies had been courting the Taliban because they thought the group would bring peace and stability to Afghanistan.

Again, the evidence supports this charge. Taliban officials made numerous comments implying that they would have never destroyed the monuments if foreign governments had recognized the Taliban. Mullah Omar defiantly declared that no one had a right to complain about the *fatwah* except for Pakistan, Saudi Arabia, and the U.A.E.⁵⁹⁹ A Taliban minister added, "We tell the United Nations to go and ask Rabbani for the statues' preservation because they recognize him."⁶⁰⁰ Meanwhile, the Afghan Foreign Minister admitted that they were attempting "to attain official recognition of the Muslim states and, in particular, from Qatar."⁶⁰¹ He noted that isolation had been a particular problem for Afghans and hoped that the destruction would not weaken its case for diplomatic recognition.⁶⁰² Even though official statements do not necessarily reveal the truth, the remarks made here were extremely pointed and consistent with the Taliban's previous efforts to gain recognition before this. For instance, the United Nations denied recognition to the Taliban five times despite the Taliban controlling ninety percent of the country.⁶⁰³ The exasperated Taliban ambassador to Pakistan exclaimed that the United Nations expected the Taliban "to handle all relevant issues as a legal and authorized government but gives recognition to the defunct regime of Rabbani. This contradicts the realities in Afghanistan."⁶⁰⁴ Hence, recognition seems to have been a major reason for the edict.

Newspapers suggested two other reasons that were implausible. First, they mused that the Taliban might have been trying to force the United Nations to rescind its sanctions.⁶⁰⁵ Yet if this were the case, the Taliban should have actually given the U.N. time to do it. Instead, the Taliban destroyed most of the Buddha statues before the first delegation even arrived in Afghanistan.⁶⁰⁶ The other argument made was that the vandalism was aimed at demoralizing the Hazara ethnic group.⁶⁰⁷ The Hazaras were one of the last remaining groups to oppose the Taliban, and they lived in the Bamiyan valley. As a result, the statues had become a symbol of Hazara pride and resistance.⁶⁰⁸ However, if discrimination against Hazaras had been the motive, the destruction of the Buddha statues would not have made sense. The

599. Chapon, *supra* note 569.

600. *Id.*

601. Indo-Asian News Service, *Taliban Minister in Qatar*, HINDUSTAN TIMES, Apr. 9, 2001, LEXIS, Nexis Library, News Group File.

602. *Afghanistan's Taliban Demand International Recognition*, AGENCE FRANCE-PRESSE, Mar. 18, 2001, LEXIS, Nexis Library, News Group File.

603. Guillaume Debre, *Taliban Asks: What Does It Take to Join the U.N. Club?*, CHRISTIAN SCI. MONITOR, Sept. 26, 2000, at A7.

604. *U.N. Seat for Ousted Afghan Regime to Prolong War: Taliban*, *supra* note 598.

605. Bashir, *supra* note 523; Anwar Iqbal, *Analysis: Buddha's Demolition May End Taliban Rule*, UNITED PRESS INT'L, Mar. 11, 2001, LEXIS, Nexis Library, News Group File; Spillius, *supra* note 519.

606. Bearak, *supra* note 536.

607. Ahmed Rashid, *Anti-Taliban Forces on Offensive*, DAILY TELEGRAPH, Mar. 29, 2001, at A21; Rashid, *supra* note 503.

608. *Id.*

Hazaras were not Buddhist but rather Shia Muslims. If the Taliban had wanted to target the Hazaras, it would have been more appropriate to choose symbols that were distinctly Shia. In addition, the edict did not apply solely to the Bamiyan Buddhas but to all non-Islamic works. Therefore, precious artifacts were being destroyed in areas unconnected to the Hazaras, such as in the Kabul museum.

Given these circumstances, it is reasonable to conclude that the Taliban embarked on its program of destruction because it was frustrated with the West and because it craved recognition as Afghanistan's official government.

D. *The Role of Cultural Heritage in Decision-Making*

Because more than ninety states, individuals, and organizations responded to the Taliban's threat, the analysis in this Section revolves around the different themes that arose during the crisis.⁶⁰⁹ It differs from the actor-centered analysis in the previous Parts because a similar exercise would be impractical here, and even if it were practical, such an exhaustive approach would not substantively change the conclusions drawn in this Article.

1. *Cultural Heritage*

The most significant observation about this case is how global participants universally condemned the Taliban's actions as being illegitimate. For example, the Ukrainian delegate went so far as to call it "a flagrant violation of international law."⁶¹⁰ More than ninety countries sponsored U.N. Resolution 55/243, which called on the Taliban to stop the further destruction of relics and to abide by its previous commitments to protect the cultural heritage.⁶¹¹ Global actors emphasized the seriousness of the heritage loss, and this was true regardless of other concerns they may have voiced. Every delegate who spoke in support of the U.N. draft resolution explicitly noted that the Buddha statues were part of the "common heritage of mankind,"⁶¹² "world cultural heritage,"⁶¹³ "cultural heritage of humanity,"⁶¹⁴ or some variation of these terms.⁶¹⁵ While it is true that these are only words, it is

609. More than ninety states sponsored the text of U.N. Resolution 55/243, the Destruction of Relics and Monuments in Afghanistan. See *supra* notes 488-517 and accompanying text.

610. U.N. GAOR, 55th Sess., 94th mtg., U.N. Doc. A/55/PV.94 (2001).

611. G.A. Res. 243, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/243 (2001).

612. Kamalesh Sharma, the delegate from India, stated, "The Taliban edict constitutes an assault not only on Afghan tradition, but on the common heritage of mankind." U.N. GAOR, 55th Sess., 94th mtg. at 6, U.N. Doc. A/55/PV.94 (2001). Japanese delegate, Yukio Satoh, said, "the historical statues and monuments of Afghanistan . . . are truly the common heritage of all mankind." *Id.* at 4. Alfonso Valdiveso, the delegate from Columbia, also appealed to the Taliban to "protect the historical and cultural relics and monuments of their country, which are the common heritage of all mankind." *Id.* at 14.

613. Durga P. Bhattarai, the delegate from Nepal expressed that "[t]he Buddha statues and related shrines in Afghanistan . . . constitute invaluable treasures of world cultural heritage." *Id.* at 12.

614. Hadi Nejad Hosseini, the Iranian delegate, found it regrettable that "a part of the cultural heritage of humanity in Afghanistan face[d] the danger of destruction by the Taliban militia." *Id.* at 10. Luis Raul Estevez Lopez, the Guatemalan delegate, compared the loss of Guatemala's "treasures belonging to the cultural heritage of humanity" and Afghanistan's monuments. *Id.* at 8.

615. Om Pradham, the delegate from Bhutan, used the phrase "common heritage of mankind." *Id.* at 6. Sun John-Yung, the South Korean delegate, used the phrase, "the cultural, historical, and

significant that so many actors supported such a conception of relics because it is difficult for world actors to reach a consensus on anything, let alone an idea that restricts the sovereignty of host states. Further evidence of genuine concern was prior worldwide attention regarding the Bamiyan Buddhas as expressed in 1998.⁶¹⁶ At that time, UNESCO's World Heritage Committee adopted a resolution proposed by Italy calling on the international community to assist in preserving Afghan heritage.⁶¹⁷ Cultural heritage was one area upon which everyone had agreed, and this was why the U.N. General Assembly adopted the resolution by consensus.

2. *Religious Tolerance*

A second manifest concern, especially among Buddhist states, was the fear of religious persecution and intolerance. Even though the Bamiyan statues had independent cultural value, they were still religious monuments. Speaking on behalf of the General Assembly, the German delegate, Dieter Kastrup said, "We strongly condemn these acts of destruction as irresponsible acts of religious intolerance." Because of the Taliban's goal for a truly Islamic state,⁶¹⁸ actors naturally viewed the edict as hostile towards Buddhism and other religions in general. Sri Lanka,⁶¹⁹ Thailand,⁶²⁰ Bhutan,⁶²¹ and Nepal,⁶²² countries with large Buddhist populations, were particularly distressed. Sri Lanka wanted to launch an international drive to save the statues,⁶²³ and even after they were destroyed, it committed itself to building replicas of the monuments.⁶²⁴ Russian Buddhists tried to organize a collective response from

religious heritage of all mankind" while the Thai delegate, Asda Jayanama, and the Cambodian delegate, Sun Suon, preferred the "cultural heritage of mankind." *Id.* at 9, 11, 13. Others chose to note the significance of the Afghan heritage to the world. Pierre Schori of Sweden, speaking on behalf of the European Union and associated states, took this approach. The Egyptian delegate, Ahmed Aboulgheit, stated, "the historical heritage of the various civilizations belongs to all humanity," and the Pakistani delegate, Masmasood Khalid, attached great importance to the "world's archaeological, historical, cultural and religious heritage." *Id.* at 9, 10. Anund Priyay Neewoor, the Mauritian delegate, spoke of a "cultural catastrophe of world-wide significance." *Id.* at 12. Meanwhile, the Russian Foreign Ministry called the destruction an "encroachment on the cultural heritage of not only the Afghan people, but the world civilization." Ulyanovsky, *supra* note 508.

616. UNESCO, *World Heritage Committee Expresses Concern Over Afghan Heritage and Illegal Traffic in Cultural Property*, 3 ART ANTIQUITY & LAW 100, 100 (1998).

617. *Id.*

618. U.N. GAOR, 55th Sess., 94th mtg. at 1, U.N. Doc. A/55/PV.94 (2001).

619. Buddhists make up seventy percent of the population in Sri Lanka. *Sri Lanka Makes Last Ditch Effort to Save Ancient Buddha Statues*, XINHUA NEWS AGENCY, Mar. 14, 2001, LEXIS, Nexis Library, News Group File. De Saram, the Sri Lankan delegate, emphasized his country's connection to Buddhism in his remarks sponsoring the U.N. Resolution. U.N. GAOR, 55th Sess., 94th mtg. at 5, U.N. Doc. A/55/PV.94 (2001).

620. Thailand's U.N. delegate proclaimed that "[a]s a predominantly Buddhist country, Thailand and the Thai people are saddened at the edict issued by the Taliban leaders." *Id.* at 11.

621. Om Pradham of Bhutan told the U.N., "Buddhism is an integral part of my country's heritage . . . we respect other beliefs, religions and ways of life . . . We are therefore deeply appalled by the Taliban's edict ordering the destruction of the Buddha statues and by the ongoing acts of such destruction." *Id.* at 6.

622. The Nepalese delegate supported the resolution because of the "deep significance of religious and cultural tolerance." *Id.* at 12.

623. *Sri Lankan PM in Pakistan for Talks on Afghan Statues Destruction*, *supra* note 511.

624. *Sri Lanka to Build Bamiyan Buddha Replicas*, AGENCE FRANCE-PRESSE, Mar. 25, 2001, LEXIS, Nexis Library, News Group File.

Buddhists around the world.⁶²⁵ Japan,⁶²⁶ Colombia,⁶²⁷ Egypt,⁶²⁸ and Mauritius⁶²⁹ joined the Buddhist nations in stressing the importance of religious tolerance in their pleas to the Taliban. Thus, a fair number of international actors were concerned about tolerance among people of different religions.

3. *Cultural Tolerance*

Still, other states were moved by what they perceived to be discrimination towards other cultural groups. India called the Taliban decree an act of "cultural nihilism" and recalled that a prior Taliban edict had ordered minorities to wear identifying marks.⁶³⁰ Others noted that it was ironic that such an explicit act of intolerance should take place during the U.N. Year of Dialogue Among Civilizations since a purpose of the year was to encourage respect for cultural differences.⁶³¹ Some states went even further and linked respect for cultural and religious differences to peace and stability in the world.⁶³² It appears then that a significant concern of international actors was the acceptance of different cultural groups. Ultimately, however, the rhetoric surrounding cultural and religious tolerance might have been derived from a fear that the Bamiyan destruction portended more extreme behavior in the future.

4. *Defense of Islam*

Without a doubt, a major consideration of Muslim countries involved in the international protest was improving the reputation of Islam throughout the world. The fifty-six-member Organization of Islamic Conferences (OIC) was dedicated to correcting the image of Islam at the international level and to fighting extremist trends claiming to be religious.⁶³³ The Taliban would seem

625. Ulyanovsky, *supra* note 508.

626. Japan found it ironic that such a thing could occur in "this United Nations Year of Dialogue among Civilizations, during which the international community is to reconfirm the spirit of tolerance and respect for cultural and religious differences." U.N. GAOR, 55th Sess., 94th mtg. at 5, U.N. Doc. A/55/PV.94 (2001).

627. The Colombian delegate, Valdiveso commented that "such decisions betray religious intolerance at a time when the international community is seeking to foster dialogue among civilizations and to strengthen the principles of tolerance and respect for religious values and beliefs." *Id.* at 14.

628. Pakistani Foreign Minister, Abdul Sattar, ordered, "Respect for other religions and for their beliefs is enjoined upon Muslims." Zubeiri, *supra* note 521.

629. The delegate from Mauritius, Neewoor, said, "[T]olerance of religions and cultural diversity within nations is the very foundation of stable societies and the pursuit of peaceful development. We urge the Taliban to adhere to these fundamental principles." U.N. GAOR, 55th Sess., 94th mtg. at 13, U.N. Doc. A/55/PV.94 (2001).

630. *Id.* at 7.

631. Japan and Colombia made this specific point before the General Assembly when supporting the draft resolution. *Id.*

632. The delegate from Mauritius believed that international peace and security was "based on this fabric of understanding and mutual respect between nations, as well as respect for the religions and cultures of all the peoples of the world." *Id.* at 13. Thailand implied the same by counting cultural diversity as a bedrock of the United Nations and its institutions. *Id.* at 11.

633. Organization of the Islamic Conference, *Resolution No. 1/5 INF (COMIAC) on the Islamic States Information Strategy*, chs. III-IV, <http://www.oic-oci.org> (last visited Dec. 5, 2002); Organization of the Islamic Conference, *Resolution No. 4/5-INF on the Islamic Information Code of Ethics*, para. 13,

to have fit within the extremist category, and its actions certainly affected Islam's image given the religious justifications for the action. Therefore, it is not surprising that Iran asked the Taliban "not to defame Islam by indulging in such activities,"⁶³⁴ or that Egypt believed the group "should refrain from taking any action that could cast a poor light on Islam."⁶³⁵ Pakistan, the Taliban's long-time supporter suggested that it could consult with clerics since the edict had "repercussions for the entire Muslim world."⁶³⁶ One purpose of the OIC visit to Afghanistan was to highlight how such *fatwahs* could prejudice Muslims interests elsewhere.⁶³⁷ Muslims in India were already feeling the effect as Hindus there burned the Koran and shouted anti-Muslim slogans.⁶³⁸ Muslim states also tried to bolster their religion's image by emphasizing that Islam preaches respect, tolerance, and wisdom.⁶³⁹ A verse from the Koran reads "You believe in your religion and I believe in my religion."⁶⁴⁰ Thus, many Muslim leaders argued that the Taliban's intolerance and disrespectful actions could not be based on the tenets of Islam.

5. *Self-Interest*

Of course, international actors may have also been motivated by self-interest. An official's public statements may belie the fact that his or her government has a questionable history of protecting cultural heritage. If the government did not care before, then why does it care now? The answer is that opposing the Taliban edict served some other interest of the actor. In this regard, it is important to discuss the motives of two states because they had both recognized the Taliban government and therefore had, presumably, greater influence on the group.

a. *Pakistan*

Although Pakistan joined the international outcry, its response was not exactly enthusiastic. Pakistan took several days to make its position known whereas other states responded immediately.⁶⁴¹ It took Pakistan almost a week to send its Interior Minister to Afghanistan even though the two countries were geographically and politically close.⁶⁴² However, the most telling evidence was Pakistan's defense of the Taliban. Mr. Khalid, the Pakistani delegate, asked the U.N. General Assembly to consider why the Taliban had

<http://www.oic-oci.org> (last visited Dec. 5, 2002).

634. Aamir Shah, *Taliban Begin Diminishing Buddhas*, UNITED PRESS INT'L, Mar. 1, 2001, LEXIS, Nexis Library, News Group File.

635. U.N. GAOR, 55th Sess., 94th mtg. at 9, U.N. Doc. A/55/PV.94 (2001).

636. *Pakistani Minister Fails to Save Afghans Statues*, *supra* note 531.

637. Al Sharq al-Awsat, *supra* note 534.

638. Anwar Iqbal, *North American Muslims Haunted by Overseas Action*, UNITED PRESS INT'L, Mar. 18, 2001, LEXIS, Nexis Library, News Group File.

639. The U.N. delegates from Iran, Egypt, Pakistan, and Mauritius explained to the General Assembly that the Taliban's actions violated the basic principles of their religion, which were respect, tolerance, and wisdom. U.N. GAOR, 55th Sess., 94th mtg., U.N. Doc. A/55/PV.94 (2001).

640. *Id.* at 13.

641. Jack Redden, *Pakistan in Awkward Position over Backing Taliban*, REUTERS, Mar. 16, 2001, at http://www.afghan-info.com/Research_Articles/Analysis_Pakistan_Taliban.htm.

642. *Id.*

resorted to such drastic measures. Pakistan believed that the Taliban was reacting to worldwide condemnation and that the world ought to acknowledge the Taliban's accomplishments. Furthermore, it held that the world needed to address the issues of peace and reconstruction of Afghanistan in order to end the cycle of misery.⁶⁴³ Pakistan's apologetic tone indicated its reluctance to defy the Taliban.

Pakistan probably joined the anti-Taliban chorus because support of the group had become a liability; it was isolating Pakistan from the rest of the world. The General Assembly exhorted the international community to "bring strong pressure to bear on Pakistan" to give up its hegemonic goals in the region, to withdraw its military from Afghanistan, and to close down the *madrassas*, which produced Taliban recruits.⁶⁴⁴ Pakistan had supported the Taliban in the past because it had believed the group would win Afghanistan's civil war. With a stable government in place, Pakistan hoped that the Taliban would quell Pashtun demands for independence and allow Pakistan to use Afghanistan as a base for its Kashmir operations.⁶⁴⁵ The ethnic Pashtuns lived on the outskirts of Pakistan and threatened national unity. In addition, Pakistan needed Afghanistan as a military base because it could not maintain a prolonged war with India over the status of Kashmir for geographical reasons.⁶⁴⁶ Hence, Pakistan had numerous reasons to support the Taliban, but it soon realized that it could not control the group and that its support was being wasted. The Taliban had not won the war after all this time, and it was fomenting Pashtunian nationalism instead of quieting it.⁶⁴⁷ Furthermore, the Taliban had been undermining the economy through its smuggling activities in Pakistan.⁶⁴⁸ Therefore, Pakistan did not have that much to lose by disagreeing with the Taliban, but it had much to gain in terms of building up political capital with the rest of the world.

b. *Saudi Arabia*

Saudi Arabia must have been motivated by something other than cultural heritage because the Saudis themselves were iconoclasts. Saudi Arabia is governed by an ultra-conservative strain of Islam, known as Wahhabism. The Wahhabis believe that icons have to be destroyed to protect the monotheistic faith.⁶⁴⁹ As a result, the Saudis have widely engaged in the destruction of relics in the name of Islam. In 1925, the kingdom's founder, Ibn Saud, ordered the wholesale demolition of holy sites in the Two Holy Places.⁶⁵⁰ In Mecca, the targets included the Prophet Mohammed's house and the cemetery where his mother, grandfather, and first wife were buried. In Medina, the Saudis

643. U.N. GAOR, 55th Sess., 94th mtg. at 10, U.N. Doc. A/55/PV.94 (2001).

644. *Id.*

645. RASHID, *supra* note 466, at 186-87.

646. Pakistan and India's dispute over the Kashmir is a crucial part of Pakistan's foreign policy. Stephen M. Walt, *Testing Theories of Alliance Formation: The Case of Southwest Asia*, 42 INT'L ORG. 275, 304-06 (1988).

647. RASHID, *supra* note 466, at 186.

648. *Id.* at 189.

649. Stephen Schwartz, *Saudi Friends, Saudi Foes*, WKLY. STANDARD, Oct. 8, 2001, at 12; *Urban Renewal in Mecca*, WKLY. STANDARD, Jan. 21, 2001, at 2.

650. Schwartz, *supra* note 649.

razed Jannat al-Baqi, where one of Mohammad's original associates, as well as other imams, were buried.⁶⁵¹ Historians have observed that since the attacks on Mecca and Medina, the pace of devastation has only increased.⁶⁵² This is probably because the Saudis issued their own *fatwah* in 1994 calling for the destruction of cultural heritage. Fatwah No. 16626 stated:

It is not permitted to glorify buildings and historical sites. Such action would lead to polytheism because people might think the places have spiritual value. And the prophet (peace be upon him) has forbidden building on or praying at graves because it is a form of polytheism. So it is necessary to reject such acts and to warn others away from them.⁶⁵³

Even though the Saudi royal family has increasingly tolerated Western practices, Wahhabism is still strong. Therefore, the country's reaction to the Taliban decree could not have been driven by heritage concerns.

Rather, Saudi reaction is more plausibly viewed as the kingdom's attempt to protect its own economic and political interests. For one, the West opposed what the Taliban was doing, and Saudi Arabia wanted to maintain good relations with the West. Saudi-U.S. relations were mutually beneficial because both countries had common concerns about regional stability and energy supply.⁶⁵⁴ Saudi Arabia valued the relationship because it wanted to ensure a long-term stable market for its oil while diversifying its economy. In recent years, the kingdom had sought to explore natural gas resources, diversify its economy, and allow more private participation in businesses because oil prices had been declining worldwide. However, all of this required the cooperation of the West.⁶⁵⁵ As for its political interests, the Saudis were now willing to criticize the Taliban because it had become disenchanted with the group in much the same way that Pakistan had. As a fellow Islamic state, Saudi Arabia sympathized with the Taliban cause. However, the Taliban now threatened to undermine royal power because it was funding radical groups to overthrow the House of Saud.⁶⁵⁶ It further antagonized the regime by supporting the Saudi dissident, Osama bin Laden, who Saudi Arabia had stripped of citizenship.⁶⁵⁷ After Mullah Omar insulted the royal family, Saudi Arabia had seen enough. It downgraded relations with the Taliban and removed its diplomatic mission from Afghanistan.⁶⁵⁸ Hence, it did not have much to lose by siding with the world on preserving cultural property.

E. *Appraisal*

This case indicates that a norm has formed against iconoclasm. As discussed above, international actors were motivated to react due to several

651. *Id.*

652. Dorsey, *supra* note 3.

653. Elaine Sciolino, *Where the Prophet Trod, He Begs, Tread Lightly*, N.Y. TIMES, Feb. 15, 2002, at A4.

654. U.S. Department of State, Bureau of Near Eastern Affairs, *Background Note: Saudi Arabia*, <http://www.state.gov/r/pa/bgn/3584.htm> (Nov. 2001).

655. *Id.*

656. RASHID, *supra* note 466, at 203.

657. *Id.* at 77.

658. *Id.* at 211.

factors. Some were compelled to protest religious intolerance while others were moved by sheer political self-interest. However, the one strand of reasoning common to all public protests was the offensiveness of destroying cultural property for iconoclastic reasons. International actors saw the Taliban's behavior for what it was, and they thought that the Taliban had no right to engage in the destruction. This was the essential difference between the reaction to the Taliban's destruction and Ceausescu's systemization policy. In the latter situation, world actors did not universally condemn the destruction based on cultural heritage. They focused on discrimination against ethnic minorities even though both issues were involved. In the case of Afghanistan, different groups also concentrated on diverse issues, but cultural property was the main concern across the various interest groups.

There might have been several reasons why this was so and why the magnitude of the response was so different between the two cases. For instance, the Bamiyan Buddhas were more recognizable as cultural property than the Romanian villages. Because the villages did not conform to the popular image of relics, those inclined to protest might have lacked the vocabulary for framing their opposition. Another possibility is that international actors did not view Buddhists as actual targets, but as symbolic victims, since no Buddhists actually lived in Afghanistan. In Romania, Ceausescu's actions affected an identifiable group. Alternatively, it could be that during the twenty-year interval between the events, the public had become more informed about, or interested in, cultural heritage preservation.

A more likely explanation is that international actors condemn iconoclasm most fiercely when the destructive acts lack a plausible justification. Ceausescu's iconoclasm in Romania was different than the Taliban's iconoclasm in Afghanistan because a better case could be made that systemization would achieve economic benefits. By contrast, the Taliban's claims that it was acting on the basis of its religious beliefs rang hollow with observers. Numerous Muslim countries and clerics condemned the destruction of the statues and proclaimed that Islam did not call for the annihilation of all non-Islamic works. Therefore, the Taliban decree appeared extreme and completely unjustified. World reaction may very well have been different, however, had others believed that the state's religion called for such actions. Then, global participants would have been faced with the dilemma of challenging the tenets of a religion in an age where religious tolerance is a virtue. It would appear, then, that the Taliban's brand of iconoclasm was criticized more harshly than Ceausescu's version because cultural heritage destruction can only be justified by some sort of received benefit. In the present case, international actors did not see any kind of advantage, whereas an economic rationale arguably existed in the Romanian situation.

VI. CURRENT STATE OF THE NORM

A. *In General*

The four case studies show an evolution in the way the world thinks about cultural heritage destruction. Over the past fifty years, no per se norm has developed against destroying relics during peacetime. However, international actors *do* expect that host states will protect their own cultural property in most circumstances. What has changed is that the world now appears to take a greater interest in relics, and as a result, it has elevated their importance as an independent reason for opposing a state's actions. In other words, cultural property is now recognized as a distinct cost in development schemes and religious or political agendas. Host states can no longer do what they want with relics and expect the world to remain silent. In addition, the erosion of sovereignty principles over the past fifty years has given international actors a greater inclination to protest the destruction of heritage in someone else's territory. The implication of these developments is that any destruction has a greater potential to cause international conflict now than in the past. This Article has traced the responses to two particular threats: economic development and iconoclasm.

B. *Economic Development*

World reaction to the two dams discussed informs us that, as a general matter, economic development is an acceptable reason for destroying cultural heritage so long as the host state makes a good faith effort to pursue the least destructive means. International actors appreciate that developing states have a right to improve their standards of living and that they should not interfere in internal matters. However, the cases also demonstrate that greater scrutiny will be given to development schemes the further away they move from meeting basic survival needs and the more options that a state has for development. Egypt could plead a relatively clear case of necessity while Turkey's need was arguable. Because Turkey did not have the threat of hunger looming in the distance, international actors focused on the huge social costs that the Ilisu Dam would have imposed. Opponents of the Ilisu did not question Turkey's right to develop, but they tried to direct Turkey towards less destructive alternatives. Meanwhile, supporters of the dam conditioned their assistance on mitigation of the dam's effects on Hasankeyf. It seems that Turkey faced more demands than Egypt because technological improvements made alternative forms of energy available and also increased the means by which Turkey could have built a less destructive dam. Therefore, the current norm probably requires host states to make certain attempts to preserve heritage even though they may have the right to destroy it for development purposes.

However, economic development may not be a valid excuse for heritage destruction if observers perceive the action to be a violation of human rights. In Turkey and Romania, many parties reacted because they viewed cultural heritage to be a proxy for cultural rights. Protesters did not believe that it was

legitimate for Turkey to demolish an important Kurdish symbol in order to destroy Kurdish culture. Similarly, systemization in Romania lost credibility as a serious economic endeavor because actors focused on the fact that it was violating the rights of Romanian peasants, as well as German and Hungarian minorities.

The current norm therefore suggests that when decision-makers are thinking about destroying relics for economic progress, at a minimum, they should pursue alternative plans that are less destructive to relics and mitigate the negative effects to the extent possible. In addition, governments should refrain from any destruction that is likely to be perceived as an attack on particular groups since the specter of human rights violations would overshadow any legitimate economic purpose. The norm has not advanced enough to conclude that states *must* do these things, but the trend is clearly moving in that direction.

C. *Iconoclasm*

In contrast, iconoclasm is not an acceptable reason to destroy cultural heritage because iconoclasm directly violates human rights. As mentioned above, actors condemned systemization in Romania because they intuited how pathological the behavior really was—pathological in that the destruction of meaningful symbols is an intolerant act perpetrated against people, and not merely things. Ceausescu destroyed the Romanian villages not because of their functional value to the peasants, but because they were integral parts of the symbol systems of these people; he wanted to quash their freedom of thought and make them conform to the state's will. In the Afghan case, the Taliban destroyed the Buddha statues because it wanted to attack something the rest of the world found meaningful. However, the negative response to the Taliban was much stronger than the reaction to systemization because the latter was understood to be an act of total extremism. The situation was not confounded by the possibility that the destruction might confer some tangible benefit on others. The actors simply did not believe that the statues were being traded for something positive. Taken together, then, the cases imply that iconoclasm is not a valid reason for destroying cultural heritage when a malicious purpose is present and a tangible benefit is absent.

D. *Evaluation*

The norm against the peacetime destruction of cultural property has evolved considerably in the last half century. Although this has been a positive development for preservation, international actors need to go further before relics are given real consideration.

As it now stands, host states have the right to destroy cultural heritage for economic progress. This Article asserts that this is the right result. It is not morally defensible to condemn people to a difficult existence in order for the world to have its museum. On the other hand, this right cannot be absolute, for if it were, host states would always be able to diminish heritage by inventing economic justifications. A new shopping mall might create jobs and tax

revenue for the government, but this should not, in most circumstances, excuse the destruction of relics. Furthermore, an absolute right to development is undesirable because parties would be able to use it as a shield for state abuses. As we have seen, Turkey may have needed to explore domestic energy sources, but it is questionable whether it needed to do so at the expense of Kurdish heritage.

Therefore, we need to have reasonable and recognizable curbs on development to protect cultural heritage. The norm is certainly evolving towards imposing those limitations. The Ilisu Dam case revealed two requirements that seem to be emerging: mitigation of injury and exploration of alternatives. To the extent these two actions are not actually required, the current norm is deficient. However, the existing state of affairs is also unsatisfactory because it completely ignores the voices of affected communities. The appropriateness of peacetime destruction in a particular case might be better determined by considering the relic's qualitative worth to the ones most touched by its disappearance. These are just a few of the shortcomings of the current norm. The next Part proposes limitations on economic development that should adequately address the concerns of both sides.

In contrast, iconoclasm provokes the opposite reaction to economic development, but this is appropriate. Iconoclasm *is* pathological in most instances, but the case studies have a bias built into them. International actors protest iconoclasm, but that is because they implicitly define it to mean the destruction of "good" symbols, or symbols worth protecting. We rarely hear protest over the destruction of Communist monuments because actors probably believe that the meaning behind them does not merit protection even though they may have historical value. When international actors decline to define these other acts as iconoclasm, they avoid the conundrum of articulating when the destruction of symbols is objectionable and when it is not. Although this results in a seemingly clear-cut norm against iconoclasm, it is not analytically satisfying. Iconoclasm is the destruction of symbols without regard to their moral worth. In other words, destroying symbols is iconoclastic whether the object is "good" or "bad." Therefore, the next Part suggests a more nuanced way for decision-makers to decide when symbols can legitimately be destroyed under international law.

VII. PROPOSAL FOR AN ALTERNATIVE NORM

A. *General Principles*

The above cases only provide a starting point for international decision-makers. The world public order would be best served if there were more concrete guidelines, which is why this Article proposes the following basic principles.

First, in any situation, there should be a presumption against destroying cultural heritage. Cultural heritage is a non-renewable and finite resource, which is why host states should take a precautionary approach. Once relics are

destroyed, they cannot be resurrected so it behooves us to be sure of the need for destruction before actually going through with it.

Second, internal decisions regarding the fate of cultural property should only be scrutinized if the property is of worldwide significance, rather than just national importance. Since the "common heritage of mankind" threatens state sovereignty, the class of properties subject to interference should be appropriately narrow. Such a rule would be better for preservation in the long run because it prevents a chilling effect. If international relics law were too intrusive, states would choose not to participate in the regime, and the world would lose its leverage with those states. The host states might cut off access to their sites, and the rest of the world would not even know about, let alone have the opportunity to protest, threats to the cultural heritage.

However, who decides which properties are of universal value? Ideally, it should be a collaborative effort between host states and international actors. This is the case most of the time for positive protective measures, such as restricting land use. States designate certain properties as national treasures, and the World Heritage Committee identifies certain of those as having "outstanding universal value."⁶⁵⁹ Cooperation is effective for screening properties because states cannot simply claim something is universally valuable for political reasons, but yet the state is involved in its own fate. The committee is comprised of cultural heritage experts from a cross-section of countries, which lends further authority to its determination. Expertise is necessary because the lay person is often not in a position to judge the value of relics whereas experts have specialized knowledge about such factors as representativeness, uniqueness, and the quality of a site. However, the situation changes when we are faced with the negative protection of forbidding destruction. In that case the state has already rejected the conclusion that the threatened property might be part of the world's heritage. The international community is effectively acting alone in defining cultural heritage, but if the designation is on the basis of expertise, this is justifiable. Giving host states the final word creates an incentive for states to define and redefine cultural properties as convenient to them rather than on the merits. However, outside opinion on a host state's property would *not* be legitimate if it were mere rhetoric. "Expertise" as used here is not limited to professionals, such as archaeologists and anthropologists, but also extends to the knowledge of communities directly connected to the property in question. For instance, Native Americans are specially situated to know whether a tribal artifact has significance. If international parties are going to define cultural property at all, the decision must be an informed one that includes local as well as global expertise.

Finally, any norm that develops should be focused on the welfare of living people. This anthropocentric proposal is acceptable because the relic itself does not have meaning absent human interpretation. This proposition would be less acceptable in a realm like the environment because people are not the only ones dependent on the ecosystem. Other plants and animals must

659. Simmonds, *supra* note 76, at 257-61 (describing the listing procedure under the World Heritage Convention).

be accounted for since they find value in the environment as well—not so with cultural heritage. Even though some might argue for the intrinsic value of cultural property,⁶⁶⁰ the fact remains that cultural heritage is ultimately a social construct. It is valuable because of its value to people. As this Article discusses in Part I, relics are significant for their associative, informational, aesthetic, and economic values, but these all turn on what people think is important today. Culture is an ever-changing concept, and what is culturally valuable one day might not be the next day. Therefore, international actors should be willing to trade off cultural property for human welfare in certain situations. It should be noted, however, that there are many measures of human welfare, and cultural heritage might be part of that calculation. The important thing is that living people are the focal point.

B. *Economic Development*

Certain conditions should also apply to the destruction of relics for development purposes. As with the Aswan High Dam, it should always be lawful to destroy cultural heritage out of economic necessity. Necessity means that the proposed development scheme is required to meet basic survival or subsistence needs, such as food, water, and shelter. Granted, economic need is not as easy to evaluate as it sounds, but international actors should at least be aware of the need to try. If the destruction is for economic development in the sense of improving the standard of living or the quality of life, then actors need to consider other factors when deciding whether to go ahead or whether to protest.

1. *Broad Interpretation of Improved Quality of Life*

Improved quality of life should be interpreted broadly with due regard for the values of association, information, aesthetics, and economics. Actors must consider these other values because cultural heritage cannot be valued like other commodities since potentially affected parties usually are not, and cannot, be parties to any market transactions.⁶⁶¹ In addition, people may derive value from simply knowing that the object exists, that they have the option of using it later, or that they can hand it down to future generations.⁶⁶² Accordingly, indicators, such as willingness to pay, will not reflect how much international actors actually value the property. States cannot assess the costs and benefits of a project in terms of traditional economic measures, such as gross domestic product or per capita income. For example, it may have been worth more to the Kurds to keep Hasankeyf than to destroy it for marginal increases in their potential income. We cannot just assume that all people want the same thing, which goes to the next principle.

660. See generally Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999) (arguing that cultural heritage is intrinsically valuable because it is part of aesthetic and cultural experience).

661. David Throsby, *Seven Questions in the Economics of Cultural Heritage*, in ECONOMIC PERSPECTIVES ON CULTURAL HERITAGE, *supra* note 25, at 16.

662. *Id.*

2. *Participation of Affected Communities*

All too often the host state makes decisions without input from the people most affected by a development plan. This is illegitimate according to the "people first" principle, given that development is supposed to improve their way of life. Thus, the decision to destroy should not be made without consulting affected communities. These may include indigenous and tribal groups, displaced peoples, or members of a particular nation, depending on the circumstance. States should give the greatest consideration to living communities with a direct connection to the threatened relic.

One objection to this proposal is that living communities would always vote against the development scheme. However, this is not necessarily the case. The affected group might consider it more important to go ahead if they lack basics like potable water and the project would solve that problem. Moreover, it is not inconceivable that the group has other reasons for approving the destruction. For example, the Zuni people carve wooden statues of war gods in order to serve as guardians for their villages.⁶⁶³ Unlike most relics however, these figures are meant to decay naturally and are not meant to be preserved for posterity.⁶⁶⁴ Similarly, the Maori people in New Zealand believe that the past should not be examined and would prefer that any discovered relics be destroyed rather than preserved.⁶⁶⁵ Even though deferring to a group's wishes may result in destruction, it would be an affront to heritage values to do otherwise.

3. *Equitable Distribution of Benefits*

Furthermore, diminishing cultural heritage should only be acceptable if the benefits are widely enjoyed or if the benefits would serve to close the income gap between the richest and the poorest classes. It would not be legitimate to destroy something of such high value if the benefits would only accrue to the wealthiest class, for example. Since the host state would be destroying the "common heritage of mankind," as much of mankind should benefit as possible. However, it would also be reasonable to engage in a plan benefiting a sole group if that group were poor or marginalized. This is because of the reason we accept development as a basis for destruction in the first place. We recognize that the people in less advanced states should have the opportunity to enjoy the comforts that those in more developed nations enjoy. Increasing the welfare of the poorest groups is consistent with that purpose. For instance, the Ilisu Dam project would have had more merit if the resettlement plan did not put the Kurds in a worse position than before the dam. According to the Turkish plan, compensation for land loss was to be determined by who held title to the property. Since most of Hasankeyf was owned by wealthy landlords, the rich were only going to get richer while the

663. Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 522 n.17 (1992).

664. *Id.*

665. Lakshum Guruswamy et al., *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 723 (1999).

poor were only going to get poorer. Under this proposed norm then, vertical inequity would be a reason for finding the Ilisu Dam to be unlawful.

4. *Least Destructive Alternative*

In addition, states should have a duty to consider any alternatives that are less damaging to the cultural heritage, taking into account the available technology of the time. International actors have already implicitly adopted this requirement as we have seen from the case studies. Therefore, it was acceptable for Egypt to build the Aswan High Dam because the dam was Egypt's best option for harnessing the Nile's power at that time. However, by the time Turkey decided to build its dam, the world knew a lot more about the extent of the harm that dams could inflict and the benefits that they sometimes failed to deliver. Thus, global participants expected Turkey to consider other forms of energy, such as solar or thermal, and to think about possibilities such as moving the site to a nearby location. Presumably, host states are already pondering several options when they decide on a particular scheme. Requiring the state to use the least destructive of these does not seem to be too onerous an obligation.

5. *Duty to Mitigate Harm*

Similarly, states should also have the duty to mitigate harm to the cultural property if they go through with their plans. In descending order, the preferred options are *in situ* preservation, excavation, and documentation. Although *in situ* preservation disturbs relics the least, it will often be impossible to preserve the property where it is. Thus, excavation becomes the next best option, but this too has its drawbacks. Experts may prefer not to excavate everything and to focus on a few sites because they lack the resources to properly maintain and care for them after they have been excavated. Some might question whether it is worth the time and expense to dig up relics that are only going to be stored in a museum warehouse. With documentation at least, the information is recorded and preserved through extensive surveys. The option states choose will necessarily be a function of the resources they have. However, this does not mean that less wealthy states have fewer responsibilities in this regard. Rather, it just means that as a practical matter, the only way they may be able to mitigate damage is by appealing to foreign governments, archaeologists, or civil society for help.

6. *Financial and Technical Support*

Finally, the international community should have a corresponding duty to contribute financially or technically if it demands preservation. Since the world benefits from the host state taking care of cultural properties, it should also bear some of the costs. Essentially, this obligation is one of reciprocity. Each side gains something of value through this requirement. However, international actors should not feel limited to donating money or teams for excavation because this proposal challenges everyone to create incentives for

the host state to preserve. Therefore, responses could range from offers to buy certain relics to forgiving debts in exchange for preservation. An objection to proposals like offers to purchase might be that it drains source nations of their cultural heritage. However, this Article takes the position that it is better for the relic to survive in another place than not to survive at all. In any case, international actors should have a duty to give assistance. History has already proven that if the heritage is outstanding enough, the world will respond.

C. *Iconoclasm*

1. *Iconoclasm as a Human Rights Issue*

The international human rights regime offers guidance about when iconoclasm should and should not be condoned because it recognizes that sometimes crimes against property are really crimes against people. When the property is a cultural symbol that is constitutive of group identity, the willful destruction of that property may amount to persecution. The most prominent example of this was the work of the *Einsatzstab Rosenberg* in destroying Jewish heritage during WWII. The world announced its repugnance by including it as a war crime before the Nuremberg Tribunal. Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) is prosecuting persons who engaged in the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”⁶⁶⁶ Although the context of these violations has been one of armed conflict, we can apply the same principles to state-sponsored iconoclasm. States are certainly capable of violating the human rights of their own people. However, this recognition alone does not answer which symbols should be protected from the iconoclastic state. Which groups and which meanings deserve protection?

2. *Symbols To Be Protected*

a. *People Without Access to Power*

International law should protect the symbolic property of those without access to power because these people are especially vulnerable to state abuses. In democratic societies, this will often mean minority groups because their small numbers make them powerless in relation to the dominant culture. Majority groups in these states do not need the extra protections of international law because they will safeguard their own cultural symbols through the institutions they control. In other words, the domestic legal system affords enough protection to these majority groups. However, in non-democratic societies, the majority group may very well be the ones who lack

666. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, Annex, at 37, U.N. Doc. S/25704 (1993). For a discussion of the ICTY’s prosecution of these cultural heritage crimes, see generally Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (2001).

power. This was true of the Romanian peasants suffering under Ceausescu's systemization program, and it may certainly be true in other totalitarian states today. In these situations, the majority cannot control the fate of its cultural property and must rely on the international system. Therefore, any protective norm should apply to these groups as well.

However, not all group symbols are necessarily cultural heritage. This Article began with a definition of cultural heritage that distinguished objects of "outstanding universal value" from items of national patrimony. If important national symbols would not qualify, then how can symbols constitutive of particular minority groups have worldwide significance? The answer is that the property can have global importance if protecting it would promote the goal of pluralism. The international community has an interest in maintaining and encouraging pluralism because it would encourage respect for individual human rights and would bolster cooperation among states. Extending protection to minority heritage would be an expressive act that legitimizes the existence and persistence of all individuals—who are necessarily located and defined by their collective memberships. The degree of difference from the majority culture would no longer be an excuse for persecution. Thus, pluralism is significant for shaping the next generation's identity and history, not just protecting past history. On a more macro level, validating different cultures may transform the paradigm of international law from one of conflict and struggle between colonizers and the colonized to one of cooperation among equals. Accordingly, national patrimony should not be elevated to the status of cultural heritage, while the constitutive cultural objects of minorities should be.

b. *Meaning of Symbols*

As to which meanings deserve protection under international law, the question can only be answered in negative terms—the norm should not defend objects that reflect values rejected by international law and especially human rights law. The Universal Declaration of Human Rights (UDHR) and other international conventions offer insight as to which actions offend the international community. For instance, the UDHR specifically mentions slavery and torture as conditions to which no one shall be subject.⁶⁶⁷ Therefore, badges of American slavery, Nazism, Apartheid, or Communism would not be protected under this proposed norm even though they may be historically significant. One might argue that it should not matter that an object symbolizes rejected values because other heritage values are at stake (for example, information). Nonetheless, it is proper to focus on associative values because iconoclasm attacks these very principles. The iconoclast does not destroy relics because of the information they contain, but rather to defeat their symbolic power. It is worth mentioning, however, that even though negative historical symbols do not receive protection under this norm, they might still be preserved. This could occur, for example, if the affected local community chose to preserve the monument as a historical artifact. Under this

667. G.A. Res. 217(III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

proposed norm then, Poland could have lawfully destroyed the site at Auschwitz, or it could have kept it as it did as a memorial and a reminder to future generations of the atrocities of the Holocaust.

c. *Meaning of Act*

Finally, international actors should also evaluate the meaning underlying the act of destruction. As the Taliban case illustrates, sometimes iconoclasm is pathological because of the motive behind it and not only because of whom it affects. Therefore, this Article proposes that the destruction of symbols be prohibited by international law when the act is one of persecution, intolerance, or rebellion against members of the global community. The Taliban decree was rightly condemned because it was a rejection of the international system and its rules of conduct. Global participants should continue to protest such actions.

In conclusion, in order for a cultural object to be protected under this proposed norm, it would have to fulfill two conditions: (1) it must be constitutive of a group's identity; and (2) it must not be symbolic of repugnant values in international law. In order for a state's destructive conduct to be objectionable, it would also have to satisfy two criteria: (1) it would indeed have to constitute iconoclasm (the destruction of the relic in order to eradicate its symbolic power), rather than destroying objects which happen to be important symbols for a group; and (2) the act would have to be antagonistic to international law, violating human rights standards or flouting international norms of conduct, for example.

Although the proposed norms may not be applicable in every case, they provide realistic guidelines for decision-makers to follow.

VIII. CONCLUSION

This Article has sought to evaluate the current state of the norm against destroying cultural property during peacetime. The development cases indicate that it would be lawful to destroy relics if doing so would help the state meet basic survival needs or improve people's way of life. Although international actors did not impose restrictions on this development right, the trend is moving in that direction. In contrast, the iconoclasm studies reveal that it would *not* be lawful to destroy or negatively affect cultural heritage for iconoclastic reasons. From the cases, this norm did not appear to be qualified. The current norm is positive in the sense that it establishes the proper baseline for thinking about heritage destruction. However, it falls short of the ideal because it does not adequately address the needs of both sides. The development norm gives too much discretion to the host states and disadvantages preservationists opposing state action. Meanwhile the iconoclasm norm is analytically unsatisfying because of its implicit refusal to distinguish between "good" destruction and "bad" destruction.

Therefore, this Article has proposed alternative standards for state behavior and international reaction. In all situations, parties should

incorporate three principles into their decision-making: (1) there should be a presumption against destroying relics; (2) actors should only focus on properties of worldwide significance; and (3) the needs of living people should always come first. This Article has also made several specific recommendations with respect to economic development and iconoclasm. Hopefully, these suggestions will serve as useful guidelines for future decision-makers and will become the law through state practice. Only by abandoning the all-or-nothing approach to preservation can we honor humans and the symbols of their significance.